91-446

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PETER R. CASTELLANO, *et al.*,

Petitioners,

– against –

BOARD OF TRUSTEES OF THE POLICE OFFICERS' VARIABLE SUPPLEMENTS FUND, BOARD OF TRUSTEES OF THE POLICE SUPERIOR OFFICERS VARIABLE SUPPLEMENTS FUND, HARRISON J. GOLDIN, and THE CITY OF NEW YORK,

Respondents.

(Full Caption Infra)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Is a state statute, enacted to implement the terms of a collective bargaining agreement between police unions and a municipality, violative the impairment of contracts provisions of Art. I., § 10 and the equal protection of the laws component of the Fourteenth Amendment of the United States Constitution, if the statute contains a restriction not expressed in the contract, which restriction excludes some of the union members from a specific benefit of the contract?

II. PARTIES

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PETER R. CASTELLANO; GARY BAKER; JEFFREY BAYNON; JAMES BRINSON; RICHARD T. CARBERRY; ROBERT A. CASABURI; MICHAEL S. CIVOLA; FRANK COSTAGLIOLA; JAMES J. CLARK; GROVER CLEVELAND; JOSEPH P. COLLINS; CARMINE DELGADO; ANTONIO D'ESPOSITO; GERALD M. EPSTEIN; JOHN C. FIORE; THOMAS FITZPATRICK; THOMAS GALANEK; SALVATORE GALLO; MARIE CASTORIRE GATTO; MICHAEL GATTO; JOHN GENTILE; MARY GLATZLE; RICHARD G. GSANGER; ROBERT HEFNER; DONALD HUDEC; RAYMOND JAYCOXE; EDWARD G. JUSTUS; THERESA KAVSER; THOMAS KING; WILLIAM F. KINSELLA; FREDERICK P. KOWSKY; JOHN MAHER; JEROME McCAMBRIDGE; MICHAEL B. McCORMICK; GEORGE McGEVNA; JOSEPH C. MERTENS; GERAD F. MILLER; FRANCISCO MURO; LORRAINE J. O'DONNELL; MATTHEW A. ORSI; RICHARD PUTONTI; ARTHUR SCARRY; JOHN SMYTH; DANIEL J. SPELLACY; ROBERT SPRAGUE; ROLAND T. SPRAGUE; RUSSELL STEINLE; ANDREW TANNARIELLO; ROBERT REDGRAVE; ALBERT F. TAYLOR; ROBERT TOBUCK; FRANK J. VENTO; VINCENT F. WARD; PAUL ZANKI; GREGORY E. KREIGER; RICHARD J. CARROLL; JOHN C. CULKIN; DANIEL F. HAUCHILD; JOHN D. KELLY; FRANCIS J. McCARVILL; JAMES A. McGINNIS; PATRICK VICTOR; EDWARD CONROY; THOMAS D. LONGOBARDI; NICHOLAS E. LUCARELLI; JOSEPH M. MARTUCCI; SALVATORE MAZOLA; VINCENT MELI; JOHN MELONE; CORNELIUS J. MURPHY; RONALD PIOTROWSKI; LOUIS ROSSO; JOHN EHLER; HENRY T. VOSS; JOHN R. WATSON; BRIAN CLARK; NATHAN S. DONATO; MICHAEL DOUGLAS; HARVEY GREENBAUM; JOHN J. HASBROUCK; RICHARD MARCH, SR.; NORMAN MARINO; THOMAS MOORE; CHRISTOPHER RUSH; STEVE SASALA; ALFONSE

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Petitioners,

— and —

CHARLES W. JONES,

Plaintiff,

— against —

BOARD OF TRUSTEES OF THE POLICE OFFICERS' VARIABLE SUPPLEMENTS FUND, BOARD OF TRUSTEES OF THE POLICE SUPERIOR OFFICERS VARIABLE SUPPLEMENTS FUND, HARRISON J. GOLDIN, and THE CITY OF NEW YORK,

Respondents.

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New York Ch. 876 Laws 1970:

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Art. 3 §B18-62.0 5

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IV. OPINIONS BELOW

The United States District Court for the Southern District of New York (Duffy, J.) in an opinion dated October 9, 1990, and reported at 752 F. Supp. 98 (S.D.N.Y. 1990) and reproduced at (A-13), the complaint was dismissed.

The United States Court of Appeals for the Second Circuit affirmed the judgment of dismissal by opinion dated June 25, 1991, ____F.2d____ (Slip Op. No. 1029, Docket No. 90-7950, 2d Cir. 1991), reproduced at (A-1).

V. JURISDICTIONAL STATEMENT

This petition seeks review of the decision of the United States District Court, Southern District of New York, dated October 9, 1991 and the judgment entered thereon, and the decision of the United States Court of Appeals for the Second Circuit dated June 25, 1991. Jurisdiction of the District Court was based on 42 U.S.C. §1983; 28 U.S.C. §§1343(a)(3), 1343(a)(4). (A-23)

The issues of violation of United States Constitution, Art. I §10, violation of equal protection of the laws, and due process components of the 14th Amendment, and the state constitutional claim were raised in the complaint in the district court (A-27, A-28) and in the United States Court of Appeals for the 2d Circuit. (A-5)

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

This petition is filed within ninety days of the date of entry of the decision of the United States Court of Appeals for the Second Circuit.

VI. CONSTITUTIONAL PROVISIONS AND LAWS

Constitutional & Statutory Provisions
***Castellano v. Bd. of Trustees* USSC**

UNITED STATES CONSTITUTION
ART. I § 10

SECTION 10

[1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

NEW YORK CONSTITUTION
ART. V § 7

Art V § 7

§ 7. [Membership in retirement systems; benefits not to be diminished nor impaired.] — After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

Ch. 876 LAWS 1970 NEW YORK

* * *

§ B18-63.0 Payment of supplemental benefits

a. The board may in its discretion authorize payments from the variable supplements fund to pension fund beneficiaries pursuant to the provisions of this article. Subject to the provisions of subdivision b of this section, such payments may be made in such form, in such amount and in such cases as the board may in its discretion determine; provided, however, that the board, in so exercising its discretion, shall give consideration to equity, fairness and principles of prudent management.

b. (1) No pension fund beneficiary shall have a right to receive variable supplements except to the extent, in the manner and for the period authorized by the board in the exercise of its discretion pursuant to this article and any such supplements granted may at any time be discontinued by the board in the exercise of such discretion.

(2) The legislature hereby declares that the variable supplements authorized by this article and the granting and receipt thereof:

(i) shall not create or constitute membership in a pension or retirement system and shall not create or constitute a contract with any pension fund beneficiary or with any member of pension fund, article one or pension fund, article two; and

(ii) shall not constitute a pension or retirement allowance or benefit under pension fund, article one or pension fund, article two or otherwise.

(3) Except as otherwise provided in section B18-27.1 of the code, nothing contained in this article shall create or impose any obligation on the part of pension fund, (article one) or pension fund, (article two) or the funds or monies thereof, or authorize such funds or monies to be appropriated or used for any payment under this article or for any purpose thereof.

c. Pension fund beneficiaries shall be eligible to receive variable supplements pursuant to this article, notwithstanding any other provision of law to the contrary.

d. (1) The board shall not grant any variable supplement pursuant to this article unless the variable supplements fund, at the time of the making of such grant, has in its possession monies or assets which are sufficient to provide such supplement and which have not been encumbered by any other grant of any such supplement.

(2) Upon the making of any such grant, the monies or assets encumbered thereby shall be set aside and shall not be used for any other purpose, except that they may be invested as authorized by section B18-65.0 of the code.

* * *

Section 1. Chapter eighteen of the administrative code of the city of New York is hereby amended by adding thereto two new articles, to be articles three and four, to read as follows:

ARTICLE 3

§ B18-60.0 Definitions

As used in this article, the following words and phrases shall have the following meanings, unless a different meaning is plainly required by the context:

1. "Variable supplements fund". The patrolmen's variable supplements fund established by this article.

2. "Association". The patrolmen's benevolent association of the city of New York.

3. "Fiscal year". Any year commencing with the first day of July and ending with the thirtieth day of June next following.

4. "Board". The board of trustees provided for in section B18-62.0 of the code.

5. "Pension fund beneficiary". Any person who (a) receives a retirement allowance by reason of having retired for service as a member of pension fund, article one or pension fund, article two and as a patrolman, or (b) receives a benefit by reason of election of an option by such a retired patrolman.

6. "Variable supplement". Any sum authorized to be paid to a pension fund beneficiary by the board pursuant to the provisions of this article.

* * *

§ B18-61.0 Patrolmen's variable supplements fund

a. There is hereby established a fund, to be known as the patrolmen's variable supplements fund. Such fund shall consist of such monies as may be paid thereto from pension fund, article two, pursuant to the provisions of section B18-27.1 of the code and all other monies received by such fund from any other source pursuant to law.

b. It is hereby declared by the legislature that the patrolmen's variable supplements fund shall not be, and shall not be construed to constitute, a pension or retirement system or fund, and that it shall function as a means whereby payments, not constituting a pension or retirement allowance, may be made at the discretion of the board in accordance with the provisions of this article, to eligible pension fund beneficiaries as a supplement to benefits received by them under article one or two of this title. The legislature hereby reserves to the state of New York and itself the right and power to amend, modify or repeal any or all of the provisions of this article.

§ B18-62.0 Board of trustees

a. The variable supplements fund shall be administered by a board of trustees which shall, subject to applicable provisions of law and to the prior approval of the board of estimate, from time to time establish rules and regulations for the administration and transaction of the business of such fund and for the control and disposition thereof.

* * *

VII. STATEMENT OF THE CASE

New York Ch. 876 Laws 1970 is legislation passed pursuant to a "Home Rule" request by the City of New York, in order to implement the terms of a collective bargaining agreement between the City of New York and its police unions. Among the provisions of the contract was the establishment of a Supplemental Pension Fund.

The collective bargaining agreement was the result of negotiations between the City of New York and its police unions. The final agreement which was the subject of the legislation also was the product of the accepted recommendations of a mediation panel chaired by former United States Supreme Court Justice Goldberg, referred to in the opinion and papers below as the "Goldberg Panel". (A-3) The contract provided as follows:

> Supplemental Pension Fund.
>
> The City and the Association agree to cause to be paid over to a separate fund, established within the Police Pension Fund, the proceeds of the annual yield and capital appreciation realized or unrealized, earned by reason of an investment in equities in excess of the yield which would have resulted from investments such as bonds, mortgages and other fixed income securities. The purpose of this fund shall be to provide supplemental benefits on a variable annuity basis, for Article I and II, as determined by the trustees. The fund shall be jointly administered by two trustees, who shall be the Mayor or his representative on the Police Pension Board and the Association designee on such Board. Deadlocks between the two trustees shall be resolved by arbitration by (arbitrator to be selected); or if he fails or is unable to serve, by arbitration provisions of this Collective Bargaining agreement.
>
> It is also agreed that the City and the Association shall jointly sponsor and support appropriate

> legislation to expand within a reasonable scope the present permissible limits on investments.
>
> The calculation to determine the amount to be paid over to the separate fund shall be made annually, not later than 30 days after the close of the fiscal year for which payment is due, and payment shall be made within 30 days thereafter. (A-49)

The Petitioners are retired members of the various police unions who retired either by reason of service connected disability, ordinary disability, or under the provisions of a pension option wherein after fifteen years a member may retire with a vested pension right, the first payment of which is deferred until on the twentieth anniversary of the commencement of service. All Petitioners are members or Art. I or Art. II of the Police Pension Fund.

Other members of the Police Pension Fund have retired after twenty or more years service. The statute purported to limit the payment of the Supplemental Pension Benefit to members who retire "for service". (Pet.P.4) A member who has served for more than twenty years, but who because of accident, or by reason of inflictions imposed by advanced age or deteriorating health and becomes disable and theretofore could have retired by reason of his having served more than twenty years, can and often does retire on ordinary disability. Others who have more than twenty years who are disabled by reason of an in the line of duty injury can and often do retire on service connected disability. (A-7).

The collective bargaining agreement itself and the Goldberg arbitration report did not limit the payments to non-disabled retirees who retire after twenty years service, nor is any member of the pension system excluded. The 2d Circuit, in its opinion at (A-9) observed:

> The legislature not only implemented the collective bargaining agreement, but it also set restrictions on

> the payment of VSF benefits, a point on which the collective bargaining agreement was conspicuously silent. Both implementation and restriction were within the power of the legislature.

The Petitioners are all members of the Police Pension Fund. Because the legislature enacted the statute with the provision that it be paid to members of the Police Pension Fund who retired "for service", the Trustees of the funds have concluded that there is a restriction on who is entitled to payments thereof. The Petitioners who retired either for disability or on the vested pension option are thus not being paid the benefits of the variable supplement fund (VFS) which was created under the provision of the contract provision which established a Supplemental Pension Fund.

Because there was no such restriction in the contract, which by its terms sets up the Supplemental Pension Fund for members of the Police Pension Fund, Art. I and Art. II, the Petitioners, as members of the Police Pension Fund, contend that the legislation impairs the obligation of the contract in violation of Art. I, § 10 of the *United States Constitution*.

The complaint alleges violation of the equal protection clause, due process clause, and contract clause of the United States Constitution, as well as *New York Constitution*, Art. V, §7. (A-26, 27, 28) It was dismissed by the District Court (Duffy, J.) on motion by the Respondents (A-13) and affirmed on appeal to the 2d Circuit, by decision dated June 25, 1991 (A-1).

VIII. REASONS FOR GRANTING THE WRIT

The State Legislature set restrictions on payment of a benefit about which the collective bargaining agreement was conspicuously silent. This violated the equal protection of the laws component of the 14th Amendment and Art. I. § 10 of the United States Constitution. This was the exercise of an executive branch function of negotiating with executive branch employees by the legislature, thereby violating the concepts of separation of powers and checks and balances of government.

Article I, §10 of the United States Constitution prohibits a state from passing any law which impairs the obligation of contracts.

The opinion of the 2d Circuit, and all the parties hereto agree that the purpose of the legislation under review was to implement the terms of the collective bargaining agreement between the City of New York and its police unions. The 2d Circuit observed that the legislature not only implemented the collective bargaining agreement, it also set restrictions on the payment of the VSF benefits, a point on which the 2d Circuit found the collective bargaining agreement to be conspicuously silent. The 2d Circuit nevertheless held that both the implementation of the contract and the restriction on the payment of the Variable Supplement Fund (VSF) payments generated by the Supplemental Pension Fund established by the contract were within the power of the legislature. (A-9)

As the parties to the contract did not provide for any exclusion, the logical inference is that no exclusion was intended. This is particularly true because the purpose of the supplemental pension fund is specifically set forth as providing a supplemental benefit Articles I and II, of which all Petitioners are members. Negotiators for two of the police unions involved specifically averred in documents presented on the motion that there was no intention to exclude any member of the Police Pension Fund. (A-50, A-51) Moreover some, but not all of the Petitioners herein became disabled after the 20th year of service, retired on disability, even though they could have retired prior thereto by reason of the 20 or more years of service. (A-44, A-59)

By fashioning an exclusion not agreed to in the contract, the legislature exercised an executive branch function and at the same time impaired the obligations of the contract to provide a supplemental pension benefit for members of Article I and Article II of the Police Pension Fund.

In addition, at the same time the Goldberg Panel considered the Police collective bargaining agreements it considered the New

York City Fire Department collective bargaining agreements as well. Yet the district court had before it the assertion that Fire Department vested retirees receive the VSF on the 20th anniversary of their service. (A-62)

The exclusion wrought by the legislature deprived the Petitioners, all of whom are members of the Police Pension Fund, Arts. I and II, of equal protection of the laws under the 14th Amendment.

There was and is no provision in the contract which excludes any member of the Police Pension Fund, Art I or Art II from the benefits of the Supplemental Pension Fund VSF payments. The sole purpose of the legislation was to implement the terms of the collective bargaining agreement.

If the legislature was unable or unwilling to accept the terms of the contract as written which terms did not set restriction on payment of the VSF benefits, its appropriate action in the matter would have been to remand the contract to the contracting parties for further negotiation or clarification. Instead, the legislature engaged in the process of negotiating an executive branch contract with employees of the executive branch to the detriment of some of the union members of the Police Pension Fund, Art. I and Art. II, by imposing an exclusion not provided for in the terms of the contract. Not only did this impair the obligations set forth in the agreement, but it also served to undermine the concept of separation of powers and checks and balances which form the basis of government.

Moreover, the Petitioners contended below that since the sole purpose of the legislation was to implement the terms of the collective bargaining agreement, the usual inquiry into the significant and legitimate public interest, often necessary to determine justification for legislative impairment of contractual obligations was not required or even justified. The 2d Circuit found this argument to be "interesting" and "ingenious", but nevertheless upheld the legislative imposition of a restriction on the payments of the VSF. The 2d Circuit recognized as did all parties hereto that:

> . . . Because this provision contemplated alteration of pension funds and their benefits, legislative approval was required before the collective bargaining agreement could be implemented. Pursuant to a "home rule" request by the city, the legislature passed a series of laws, which, *inter alia*, amended the city's administrative code and implemented the collective bargaining agreement. (A-4).

The 2d Circuit's opinion that the legislature was correct in placing a restriction on the payment of the VSF benefits which restriction was not within the terms of the contract, (A-9) and the fact that the district court gave "due deference" to the legislature in assessing the reasonableness in its distinguishing between different types of retirees (A-17) are compelling reasons why certiorari should be granted.

"Due Deference" is the standard applied where both parties to the contract affected by the legislation are private persons. In the case where a state or a municipality is a contracting party, strict scrutiny of the legislative action is the standard to be applied. *Keystone Bituminous Coal Assn. v DeBenedictis*, 480 U.S. 470 (1986); *United States Trust Co. v New Jersey*, 431 U.S. 1 (1977).

It is not appropriate for the Respondents to argue that, because the statute states the variable supplement is to be paid to service retirees, that the statute defines the bargained for right. The operative document is not the statute, but the contract which the statute was designed to implement.

New York Constitution, Art. V, § 7 provides:

> Membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

The membership in a pension or retirement system is a contractual relationship when the member joins the system, the benefits of which may not be diminished or impaired. This

provision of the state constitution is violated when changes directly related to the retirement benefit are involved. *Matter of Weber v Levitt*, 34 NY2d 797, 316 NE2d 327 (1975); *Matter of Donner v New York City Employees' Retirement System*, 33 NY2d 413, 308 NE2d 896 (1974); *Matter of Hessel v New York City Retirement System*, 33 NY2d 381, 308 NE2d 896 (1974); *Kranker v Levitt*, 30 NY2d 574, 281 NE2d 840 (1972).

In this case the contract specifically set up a "Supplemental Pension Fund" for members of Art. I and II of the Police Pension Fund. Petitioners as members of the fund were entitled to the benefit as they were not excluded from its terms by either the collective bargaining agreement or the Goldberg Report. Thus the impairment to that benefit is substantial, total and directly related to a retirement benefit.

Further, *New York Constitution*, Article VIII, §(1),(2) prohibits a city from lending or giving any money or property as a gift in aid of any individual except if the payments are made for "increasing the pension benefits payable to retired members of a Police Department."

The contract clause applies to state legislation or to an enactment of a legislative character by a municipal corporation made subsequent to the contract and which impairs its obligation. *New Orleans Waterworks Co. v Louisiana*, 185 US 336 (1902); *Bacon v Texas*, 163 US 207 (1895); *Mercantile Trust & D. Co. v Columbus*, 203 US 311 (1906).

It was the legislation itself which limited the benefits of the supplemental pension fund to "for service" retirees. The Petitioners are members of Articles I and II, many of whom have over twenty years service.

Obligations of a contract are impaired by a law which renders the obligations invalid, releases or extinguishes them, or derogates from substantial contractual rights. *Home Bldg. & L. Assoc. v Blaisdell*, 290 US 398 (1933); *Thorp v Housing Authority of Durham*, 393 US 268 (1969). The motive, policy and object of a legislative act must be looked into to determine if it impairs

the obligations of a contract. *El Paso v Simmons*, 379 US 497 (1964). Here purpose of the legislation was to implement the terms of the collective bargaining agreement, which agreement did not exclude disability or vested retirees from the benefits of the Supplemental Pension Fund.

The impairment complained of is substantial, and its level of severity is high to the point of extinguishment of the benefits to Petitioners of the Supplemental Pension Fund variable supplement payments. Such extinguishment and severity is authority to find a constitutionally cognizable impairment. *U.S. Trust Co.* at 19-20 n.17; *Allied Structural Steel Co. v Spannaus*, 438 U.S. 234 (1978); *Energy Reserves Group v Kansas Power and Light Co.*, 459 US 400, 411-412 (1983).

Moreover, even the total destruction of the contractual expectation is not necessary for a finding of substantial impairment. *Energy Reserves Group, Inc.* at 411, citing *United States Trust Co.*, at 26.

In *Treigle v Acme Homestead Assn.*, 297 US 175 (1936) it was held that a law which impairs the obligations of contact which destroys a vested right is in violation of Art. I, §10 of the United States Constitution. See also: *W.B. Worthim Co. v Thomas*, 292 US 432 (1935); *Manigault v Springs*, 199 US 473 (1905), and *Allied Structural Steel Co. v Spannaus*, 438 US 234 (1978). Here, Petitioners who were members of the Police Pension Fund had the vested right defined by *New York Constitution*, Art. V. §7 as a contractual relationship, the benefits of which shall not be diminished or impaired. Further, all parties recognize, as did the 2d Circuit that any restriction on the payment of VSF benefits was a point on which the collective bargaining agreement was conspicuously silent.

Although a legislative body need not articulate its reasons for enacting a statute [*United States Railroad Retirement Board v Fritz*, 449 U.S. 166, 179 (1980)], here the statute under review specifically indicate that it was enacted to pursuant to a home rule request to implement the terms of the collective bargaining agreement.

Under the United States Constitution, Fourteenth Amendment, a person may not be deprived of property without due process of law. In the State of New York, membership in a pension or retirement system is a contractual relationship, the benefits of which may not be diminished or impaired. New York Constitution, Art V, §7. It is thus clear that membership and its attendant benefits are property. The fact that the appellants are receiving a pension does not exonerate the concept that beyond the pension is the membership in the pension fund and any other benefits which are accorded to the members.

It is no defense that the Trustees allege they are acting in accordance with state statutory authority. Deprivation of due process may be effected by compliance as well as by noncompliance with a state statute. *Addante v Village of Elmwood Park*, 541 F.Supp 497 (N.D. Ill, 1982). Property interests are not created by the Constitution, rather they are created and defined by state or federal statutes, local ordinances and express or implied contracts. *Bishop v Wood*, 426 U.S. 341 (1976); *Arnett v Kennedy*, 416 U.S. 134 (1974).

The state statute under review was constitutionally implemented, except for the restriction which the 2d Circuit held was not contained in the contract, and was fashioned by the legislature. Thus the words purporting to restrict the benefits of the Supplemental Pension Fund from any member of the Police Pension Fund VSF payments, which restriction was not contained in the contract negotiated by the executive branch with its police unions, are violative of Art. I, 10 of the Constitution. When stricken, the surviving statute would expunge the restriction and thereby conform with the collective bargaining agreement and the Goldberg Report.

IX. CONCLUSION:

Certiorari should be granted because membership in pension plans, career path expectations and the strength and stability of pension funds and pension management institutions constitute matters of national significance. The importance of these issues finds expression in massive legislation, both on the national and state level, designed to insure the integrity of the pension plans, secure pension rights, proscribe discriminatory exclusions because of age, sex or race or disability, and provide for the financial stability of pension systems. Further, the legislative exercise of executive branch functions in negotiating with employee unions violates concepts of separation of powers and checks and balances which should be reviewed by this Court.

September 10, 1991

Respectfully Submitted:

Ronald Podolsky
Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

For the Second Circuit

- - - - - - - - -

No. 1029 August Term 1990

Argued: January 28, 1991 Decided: June 25, 1991

Docket No. 90-7950

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PETER R. CASTELLANO, *et al.*,

Plaintiffs-Appellants,

- against -

BOARD OF TRUSTEES OF THE POLICE OFFICERS' VARIABLE SUPPLEMENTS FUND, BOARD OF TRUSTEES OF THE POLICE SUPERIOR OFFICERS' SUPPLEMENTS FUND, HARRISON J. GOLDIN, and THE CITY OF NEW YORK,

Defendants-Appellees.

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BEFORE: KEARSE, PRATT, and McLAUGHLIN, *Circuit Judges:*

Plaintiffs, retirees from the New York City police force, appeal from a judgment of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge*, dismissing their complaint, which claimed a right to funds supplementing their pensions, for failure to state a claim under which relief could be granted.

Affirmed.

RONALD PODOLSKY, New York, NY, *for Plaintiffs-Appellants.*

TIMOTHY J. O'SHAUGHNESSY, New York, NY (Victor A. Kovner, Corporation Counsel of the City of New York, Fay Leoussis, of counsel), *for Defendants-Appellees.*

PRATT, *Circuit Judge:*

Under the New York City Administrative Code, members of the police force may retire for numerous reasons. A member may retire for "ordinary disability", meaning that "such member is physically or mentally incapacitated for the performance of duty and ought to be retired." N.Y.C. Admin. Code § 13-251 (1988). Similarly, a member may retire for "accident disability", which means that his physical or mental incapacitation is "as a natural and proximate result of" service in the police force. *Id.*, § 13-252. A member may also retire without a physical disability. If the member has 15 years of police service, but less than 20, he may retire with a deferred vested pension benefit, payment of which is to begin at a later date. *Id.*, § 13-256. Finally, if a member has served 20 years in the force, and does not retire under a disability, he may retire "for service". *Id.*, §§ 13-246, 13-247.

The reason a member retires has important ramifications for his retirement income, not the least of which is the fact that only "for service" retirees receive "variable supplements", which do "not constitut[e] a pension or retirement allowance", *see* N.Y.C. Admin. Code §§ 13-269(b), 13-279(b) (added by N.Y. Laws ch. 876, § 1), but are instead supplemental monies paid in addition to pension benefits. None of the plaintiffs, who are all retired members of the police force, retired "for service". It is undisputed that they are receiving the pensions to which they are entitled, but they claim an entitlement to the variable supplement payments as well. They mount four constitutional challenges, both state and federal, to the statutes which create and define the variable supplements funds in a way that excludes them from the benefits of the funds.

BACKGROUND

Because this is an appeal from a motion to dismiss for failure to state a legally-cognizable claim, we assume the truth of the material facts alleged in the complaint; we also take judicial notice of all pertinent statutory material. Plaintiffs, retired members of the New York City Police Department, all retired after 1968. Some retired under ordinary disability, others under accident (service-connected) disability; still others retired under a deferred vested pension benefit provision.

Defendant Board of Trustees of the *Police Officers'* Variable Supplements Fund is a statutory entity which administers the Police Officers' Variable Supplements Fund. Defendant Board of Trustees of the *Police Superior Officers'* Variable Supplements Fund is a statutory entity which administers the Police Superior Officers' Variable Supplements Fund. Defendant Harrison J. Goldin is comptroller of the City of New York, a member of both aforementioned boards of trustees, and the custodian of the assets of each Variable Supplements Fund ("VSF"). The City of New York ("city") is a municipal corporation of the State of New York. On this appeal, the defendants are not distinguished, for they all share a common interest.

In 1968, then-Mayor of New York John V. Lindsay appointed a special panel to assist in contract negotiations between the city and the unions representing police, fire-fighters, and sanitation workers. The panel was chaired by retired Supreme Court Justice Arthur J. Goldberg. One of the recommendations of the Goldberg panel, the one at issue in this case, was to create "Supplemental Pension Funds" (now known as VSFs). The Goldberg panel's recommendation was adopted verbatim into the collective bargaining agreement between the Patrolmen's Benevolent Association and the city. This provision reads, in pertinent part:

> The City and the Association agree to cause to be paid over to a separate fund, established within the present Police Pension Fund, the proceeds of the annual yield and capital appreciation, realized or

> unrealized, earned by reason of an investment in equities in excess of the yield which would have resulted from investments such as bonds, mortgages, and other fixed income securities. The purpose of this fund shall be to provide a supplemental benefit on a variable annuity basis, for Articles I and II, as determined by the trustees. The fund shall be jointly administered by two trustees, who shall be the Mayor or his representative on the Police Pension Board and the Association designee on such Board. Deadlocks between the two trustees shall be resolved by arbitration by (arbitrator to be selected); or if he fails or is unable to serve, by the arbitration provisions of this Collective Bargaining agreement.

Because this provision contemplated alteration of pension funds and their benefits, legislative approval was required before the collective bargaining agreement could be implemented. Pursuant to a "home rule" request by the city, the legislature passed a series of laws, which, *inter alia*, amended the city's administrative code and implemented the collective bargaining agreement.

As implemented, the VSFs are funded by a formula, which provides that when a pension fund's earnings from investments in equities surpass what they would have been, hypothetically, had the investments been placed in fixed income obligations, the windfall is allocated to the two VSFs. *See* N.Y.C. Admin. Code § 13-232. If the earnings from investments in equities are less than the hypothetical earnings from fixed-income obligations, no funds are transferred to the VSFs.

The implementing statute, 1970 N.Y. Laws ch. 876, gave each of the boards of trustees discretion to authorize payments from the VSFs to pension fund beneficiaries, and broad discretion as to the form of the payments, the amounts of the payments, and the cases in which payments would be made. The trustees' discretion regarding the payments is circumscribed by considerations of "equity, fairness, and principles of prudent management." *Id.*

However, chapter 876 also makes clear that the VSFs "shall not be, and shall not be construed to constitute, a pension or retirement system or fund", and the payments from the VSFs do not constitute "a pension or retirement allowance." N.Y.C. Admin. Code §§ 13-269(b), 13-279(b). The legislature further confined the benefits of the VSFs to "for service" retirees, thereby excluding the plaintiffs, all non-"for service" retirees, from the benefits of the VSFs.

The plaintiffs filed this action in the district court, claiming that because they do not receive variable supplements, their rights under the United States Constitution's equal protection clause, due process clause, and contract clause are being violated. The plaintiffs also alleged that the VSFs, as presently implemented, violate N.Y. Const. art. V, § 7.

The defendants moved to dismiss the complaint for failure to state a legally-cognizable claim pursuant to Fed. R. Civ. P. 12(b)(6), and the district court agreed. In an "endorsement" reported at 752 F. Supp. 98 (S.D.N.Y. 1990), Judge Duffy held that the "for service" classification "was a legitimate attempt to equalize benefits among the various classifications of retired members", thereby providing "a plausible and rational basis for the classification of VSF payments," and passing muster under the equal protection clause. *Id.* at 101. He also held that since the receipt of VSF payments was not an integral part of the pension fund contract, there was no violation of the contract clause. *Id.* at 102. Judge Duffy further held that since the plaintiffs' contributions did not entitle them to the investment earnings of the VSFs, there was no protected property interest in the benefits. *Id.* at 100. Since no federal issues survived dismissal, Judge Duffy exercised his discretion to dismiss the pendent state constitutional claim as well. *Id.* at 102.

The plaintiffs renew their arguments on appeal.

DISCUSSION

A. *Equal Protection*

The plaintiffs claim that the statutory scheme, authorizing payments to "for service" retirees, while denying payments to those police officers who retired under other circumstances, violates the equal protection clause. It is well-settled that when a state classifies groups based upon non-suspect criteria, and the classification does not involve a "fundamental right", that classification violates the equal protection clause only if it has no "reasonable" or "rational" basis. *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983); *Texaco, Inc. v. Short*, 454 U.S. 516, 539 n.36 (1982); *Western & Southern Life Insurance Co. v. State Bd. of Equalization*, 451 U.S. 648, 672 (1981); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *Mathews v. De Castro*, 429 U.S. 181, 185 (1976). "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). Plaintiffs and defendants both agree that the "reasonable basis" standard is the applicable standard against which to test the legislation at issue.

The definition of "for service" contributes to the present conflict. The statutory scheme gives the trustees discretion to authorize payments from the VSFs to "pension fund beneficiaries". N.Y.C. Admin. Code §§ 13-271(a) (1), 13-281(a). A "pension fund beneficiary" is a police officer retired "for service". *Id.*, § 13-268 (5). Under this scheme, for example, a 22-year veteran of the police force — who retires "on disability" from a "line-of-duty" heart attack — is not allowed to benefit from the VSFs, even though he could have retired "for service" after 20 years of service. *See Application of Ryan*, 525 N.Y.S.2d 487, 487-88, 138 Misc. 2d 826, 826-27 (N.Y. Sup. Ct. 1988), *aff'd*, 151 A.D.2d 1055, 546 N.Y.S.2d 504 (1st Dep't)

(mem.), *appeal dismissed*, 74 N. Y. 2d 944, 549 N. E. 2d 479, 550 N.Y.S.2d 277 (1989). Plaintiffs claim that this sort of inconsistency proves the statutory scheme to be "wholly irrelevant to the achievement of a valid state objective" and lacking a "fair and substantial relation to the object for which the Variable Supplements Funds were enacted." *See* Complaint at ¶ 15.

We disagree. As was pointed out in *Application of Ryan*, although there are exceptions, disability retirees *generally* work for shorter periods of time than "for service" retirees, and therefore make lower total contributions to the pension funds. *Id.*, 525 N.Y.S.2d at 488, 138 Misc. 2d at 827. Additionally, the pensions of accident disability retirees equal three-fourths of their annual compensation at retirement (an amount not subject to federal income tax, *see* 26 U.S.C. § 104(a)(1)); they also receive an annuity. N.Y.C. Admin. Code § 13-258. Their compatriots who retire "for service", on the other hand, receive a retirement allowance of a pension (which *is* subject to the federal income tax laws) plus one annuity which, when added together, equals one-half of their annual compensation at retirement. *Id.*, § 13-255(1).

In allowing VSF payments only to "for service" retirees, the city struck a balance between "for service" and other retirees. If the city had not struck such a balance, and allowed VSF payments across the board, disability retirement might be too favorable an option, one which might encourage members of the force to seek classification as "disabled" in order to receive higher retirement benefits. Similarly, granting VSF benefits to "for service" retirees, while refusing those benefits to early retirees, serves the legitimate governmental interest of discouraging experienced members of the police force from seeking early retirement. Given these considerations, and since "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), the district court was correct in refusing to set aside the VSF plan.

Although there may be better ways to draft the statutory scheme, we conclude that the scheme at issue bears a reasonable relationship to the legitimate governmental interests of

reducing the disparity of retirement benefits among classes of retirees, and encouraging continued service of experienced officers. Even though not blessed with mathematical perfection or perfect equality, the scheme is reasonable enough:

> The problems of government are practical ones and may justify, if they do not require, rough accomodations — illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy.

Metropolis Theater Co. v. Chicago, 228 U.S. 61, 69-70 (1913). *Compare Poggi v. City of New York*, 109 A.D.2d 265, 273-75, 491 N.Y.S.2d 331, 338-39 (1st Dep't 1985) (formula allocating transfers between the Police Superior Officers' VSF and Patrolmen's VSF could rationally be based on differences between patrolmen's and superior officers' service retirement allowances), *aff'd*, 67 N.Y.2d 794, 492 N.E.2d 397, 501 N.Y.S.2d 324 (1986).

Plaintiffs do advance, however, an interesting argument. They point out that the legislation at issue, which was passed pursuant to a "home rule" request by the city, had a singular purpose: implementing the collective bargaining agreement. The "reasonableness" of the legislation, therefore, must be tested not to determine whether "any state of facts" justifies the legislation, but *only* to determine whether the particular terms of the collective bargaining agreement justify the legislation. According to the plaintiffs, since the only governmental interest at issue was the implementation of a collective bargaining agreement, the test to be applied to the legislation under the equal protection clause is to determine whether it bears a reasonable relationship to *that* governmental interest.

Although ingenious, this argument has a serious flaw, for it seems to rest on an untenable view of the lawmaking process. According to the plaintiffs, the legislature could do nothing more than implement the collective bargaining agreement in accordance with the home rule request. We are not satisfied that the legislature's hands were so tied. *See* N.Y. Const. art. IX, § 2(b)(3):

> [T]he legislature * * * [s]hall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, *and to withdraw or restrict such additional powers.*

(emphasis added). The legislature not only implemented the collective bargaining agreement, but it also set restrictions on the payment of VSF benefits, a point on which the collective bargaining agreement was conspicuously silent. Both implementation and restriction were within the power of the legislature.

Because the legislature's judgment was rationally related to legitimate governmental objectives, the statutory scheme does not violate the equal protection clause.

B. *Contract Clause*

Plaintiffs' second attack on the validity of the VSF scheme arises out of the contract clause of U.S. Const. art. I, § 10, which prohibits states from passing any "Law impairing the Obligation of Contracts". The plaintiffs contend that the provisions of both chapter 876 and the pertinent sections of the New York City Administrative Code impair the obligations of the collective bargaining agreement, since those provisions exclude them from the VSF payments made available to "for service" retirees, an exclusion contained in neither the Goldberg panel report nor the collective bargaining agreement itself.

We disagree. The collective bargaining agreement, which follows the language of the Goldberg panel report, merely sets

up a "supplemental pension fund" that has as its purpose "to provide a supplemental benefit on a variable annuity basis * * *, as determined by the trustees." It says nothing about who may be beneficiaries. Simply because the agreement is silent as to which members will receive VSF payments, it does not follow from this silence that *all* pensioners are contractually entitled to such payments. The administrative code, on the other hand, speaks to the matter clearly: "[W]here the statute speaks with clarity, the statute is the only safe guide through the arcane area of public employees' pension rights." *Di Giacomo v. City of New York*, 58 A.D.2d 347, 362, 397 N.Y.S.2d 632, 642 (1977) (Silverman, J., dissenting in part), *rev'd*, 46 N.Y.2d 894, 387 N.E.2d 622, 414 N.Y.S.2d 690 (1979) (based on Justice Silverman's dissenting opinion). In short, the collective bargaining agreement created a fund; it did not establish the beneficiaries of that fund. The beneficiaries were determined by the legislature in its implementing statute.

The threshold inquiry in any contract clause analysis is the severity of the impairment of the contractual relationship. "The severity of the impairment measures the height of the hurdle the state legislation must clear," *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978); since we find absolutely no impairment of the city's obligations under the collective bargaining agreement, there is no contract clause "hurdle" to leap, and our inquiry ends. The district court properly dismissed the contract clause claim under Fed. R. Civ. p. 12(b)(6).

C. *Due Process*

As a third attack on the constitutionality of the VSF statutory scheme, the plaintiffs allege that the scheme deprives them of a property right without due process of law. We need not pause long to dispose of this contention, for plaintiffs fail to establish that they have any property right to the VSF benefits. In *Crown v. Trustees of the Patrolmen's Variable Supplements Fund*, 819 F.2d 47 (2d Cir. 1987) (per curiam), we affirmed the district court's rule 12(b)(6) dismissal of a similar property right claim substantially for the reasons that had been developed in

the district court's opinion, an excerpt from which is worth repeating here:

> While there is no question that plaintiffs have an entitlement under New York law to receive their pension payments – which they are receiving – they have no entitlement to, or right to direct the retention of, the particular assets that are held for investment purposes in the pension fund. * * *. The New York courts have specifically analyzed this issue in the context of the Pension Fund and concluded that, "except to the extent that [the Pension Fund] is required to pay interest on members' accumulated contributions * * *, the Pension Fund is not required * * * to pay investment earnings [VSFs] to its members * * *. Thus, investment earnings are not a statutory component of Pension Fund benefits." *Poggi v. City of New York*, 109 A.D.2d 265, 491 N.Y.S.2d 331, 336 (1st Dep't 1985), *aff'd mem. on other grounds*, 67 N.Y.2d 794, 492 N.E.2d 397, 501 N.Y.S.2d 324 (1986).

Crown v. Trustees of the Patrolmen's Variable Supplements Fund, 659 F. Supp. 318, 320 (S.D.N.Y.) (citation omitted), *aff'd*, 819 F.2d 47 (2d Cir. 1987) (per curiam). Since, under New York law, the plaintiffs have no "legitimate claim of entitlement" to the VSFs, *see Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), there is no protectable property interest, and the fourteenth amendment's due process guarantee does not attach.

D. *The State Constitutional Claim*

The final claim pressed by the plaintiffs would require us to interpret the Constitution of the State of New York. Plaintiffs cite *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), in support of their argument that the district court should not have dismissed the pendent state law claim. We agree that *Gibbs* controls, but disagree that it leads to the conclusion that the pendent state claim should have survived dismissal. "[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right.

Its justification lies in considerations of judicial economy, convenience, and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims." *Id.* at 726.

Since the district court dismissed the federal claims, and we have affirmed, there remains no independent basis for federal jurisdiction: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* at 726. *See also* 28 U.S.C. § 1367(c)(3) (effective Dec. 1, 1990) (codifying existing caselaw and giving district courts discretion to decline to exercise supplemental jurisdiction where "the district court has dismissed all claims over which it has original jurisdiction").

Our concern with comity between the federal and state courts also supports this conclusion. In *Poggi v. City of New York*, 67 N.Y.2d 794, 492 N.E.2d 397, 501 N.Y.S.2d 324 (1986), a case also involving VSFs, the New York Court of Appeals summarily affirmed an order of the Appellate Division, but noted: "[W]e do not reach the question whether the variable supplements funds constitute a pension or retirement benefit," as the Appellate Division had in declining to accord the plaintiffs relief under N.Y. Const. art. V, § 7. *Poggi*, 67 N.Y.2d at 794, 492 N.E.2d at 397, 501 N.Y.S.2d at 324. It would be, at the very least, imprudent for us to determine a state constitutional claim of first impression. *Compare* 28 U.S.C. § 1367(c)(1) (granting district courts discretion to decline the exercise of supplemental jurisdiction where "the claim raises a novel or complex issue of State law"). We therefore affirm the dismissal of the pendent state constitutional claim.

CONCLUSION

The judgment of the district court, dismissing the plaintiffs' federal claims for failure to state a legally-cognizable claim, and their state claim for lack of pendent jurisdiction, is affirmed.

OPINION ENDORSEMENT
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Peter R. Castellano et al., Plaintiffs, v. Board of Trustees of the Police Officer's Variable Supplements Fund, Board of Trustees of the Police Superior Officers' Supplements Fund, Harrison J. Goldin, and The City of New York, Defendants.
89 Civ. 3272 (KTD)

Plaintiffs, Peter R. Castellano et al. ("Castellano"), former police officers, former police superior officers, and former police detectives who retired on accident disability, ordinary disability, or with a vested right to a deferred retirement allowance, bring action pursuant to 42 U.S.C. § 1983 (1982) against defendants, Board of Trustees of the Police Officer's Variable Supplements Fund, Board of Trustees of the Police Superior Officers' Supplements Fund, Harrison J. Goldin, and The City of New York ("Board of Trustees"), claiming deprivation of, and entitlement to receive, certain supplementary payments from either the Police Officers' Variable Supplements Fund or the Police Superior Officers' Variable Supplements Fund ("VSFs"). Castellano claims that the denial by the Board of Trustees to pay the officers from the VSFs constitutes, under color of state law, a: (1) denial of equal protection of the laws under the fourteenth amendment; (2) deprivation of property without just compensation and without due process of the law; (3) interest; and an (4) impairment of property rights in the assets of the Police Pension Fund, Art. II and the VSFs. The Board of Trustees moves pursuant to Fed. R. Civ. P. 12(b) (6) to dismiss Castellano's complaint for failure to state a claim and lack of standing; Castellano cross-moves pursuant to Fed R. Civ. P. 56 for summary judgment to receive payments.

Specifically, Castellano is one of more that 180 police officers who, prior to retiring, were members of the Police Pension Fund, Article 2 ("Pension Fund"). They are currently beneficiaries of the Pension Fund, pursuant to § 13-214(5) of the Administrative Code of the City of New York ("Administrative Code").[1] These

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[1] The Pension Fund is governed by §§ 13-214 through 13-267 of the Administrative Code. The Administrative Code provides for: (1) member

(Footnote continued)

VSFs were established pursuant to vast legislation, they are separate legal entities from the Pension Fund, and are governed by their own Boards of Trustees. Admin. Code §§ 13-269, 13-270, 13-272, 13-278–287. The statute establishing the VSFs expressly provides that the supplemental payments made by these Funds shall not constitute pension or retirement benefits under the Pension Fund. Admin. Code §§ 13-271(b)(2)(ii), 13-281(b)(2)(ii).

Administrative Code § 13-232 provides the source of funds for the VSFs. A portion of the investment earnings generated by the assets managed by the Pension Fund, including assets contributed both by police officers and by the City, is transferred to fund the VSFs. When the Pension Fund's earnings, from assets invested in equities, exceed the hypothetical earnings which the same amount of assets would have generated if invested in fixed income securities, then the equivalent of this excess is transferred to the VSfs. The Boards of Trustees of the two VSFs may authorize payments from the Funds to pension fund beneficiaries in such amount and in such cases as they may in their discretion determine, subject to standards of "equity, fairness and prudent management." Admin. Code §§ 13-269(b), 13-279(b). Payments may be made to "eligible pension fund beneficiaries" and such payments may be discontinued at any time. Admin. Code §§ 13-271(b)(2)(i), 13-281(b)(2)(i).

"Pension fund beneficiary" is defined in various sections of the Administrative Code as a police officer or police superior who has "retired for Service."[2] Castellano et al. did not retire

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contributions, § 13-225; (2) the return of contributions with accumulated statutory interest if a member resigns or is discharged prior to retirement, § 13-240; and (3) retirement allowances for those police officers who fulfill all prerequisites for § 13-255 service retirement, § 13-257 ordinary disability, and/or § 13-258 accident disability.

[2] The amended definition of "pension fund beneficiary" is: "Any person who receives a retirement allowance by reason of having retired, on or after October first, nineteen hundred and sixty eight, *for service* (with credit for

(Footnote continued)

for service. They retired either for ordinary disability, accident disability, or with a vested right to a deferred retirement allowance. Complaint ¶¶ 2, 11. As such, Castellano does not fall within the purview of the class of persons to whom the Boards of Trustees of the VSFs are authorized to make variable supplement payments.

It is of no moment that Castellano asserts the Board of Trustees deprived him and his fellow officers of property without just compensation and without due process of the law in violation of the fourteenth amendment to the United States Constitution. In order to have a property interest in a benefit, a plaintiff must have "a legitimate claim of entitlement" to such benefit, which is cognizable under state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Castellano contends that a protected property interest exists because police officers contributed, through payroll deductions, to the funds comprising the VSFs and as such have an interest therein in the investment earnings which the VSFs have generated. Complaint ¶¶ 4, 8. This is belied by the fact that Castellano et al. contributed to the annuity portion of the total retirement allowance which they now receive. *See* Admin. Code § 13-256(c)(1) (vested right retirement allowance); § 13-257(1) (ordinary disability retirement allowance); § 13-258(1) (accident disability retirement allowance). Moreover, those contributions constitute entitlement to investment earnings of neither the Pension Fund, nor VSFs. *See Crown v. Trustees of Patrolmen's Variable Supplements Fund*, 819 F.2d 47, 47-48 (2d Cir. 1987) (motion to dismiss granted where plaintiffs, former patrolmen and superior officers of the New York City Police Department, failed to allege a constitutionally protected property right to variable supplements fund payments

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twenty or more years of service creditable toward the minimum period) as a member of pension fund, subchapter one or pension fund, subchapter two and as a police officer." Admin. Code § 13-268(5) (emphasis supplied). Furthermore, "a minimum period" is defined as: "The minimum period of credited service which a member of a pension fund . . . . is required by law to perform in order to be eligible to retire *for service* with immediate payability of retirement allowance." Admin. Code § 13-268 (1)(a).

because there is no entitlement to assets or earnings of assets held for investment purposes in a pension fund); *Poggi v. New York*, 109 A.D.2d 265, 491 N.Y.S.2d 794, 501 (N.Y.S.2d 324, 492 N.E.2d 397 (1986) (investment earnings not considered statutory element of Pension Fund Benefits). The enabling state legislation expressly provides that the supplementary payments are not considered pension or retirement payments, are legally distinct from the pension funds, and are not payable to people such as Castellano et al. who had not retired "for service," as delineated in the code. Castellano therefore fails to allege a constitutionally recognized property right in the VSFs. The retirees at bar already receive all the due pension payments to which they are entitled.

Castellano further avers that the Board of Trustee's actions in making VSF payment to those who have retired for service, while denying such payments to all other classes of retirees, denies them equal protection of the laws in violation of the fourteenth amendment to the United States Constitution. Complaint ¶ 14. In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are less than perfect. If the classification has some "reasonable basis," it does not offend the Constitution. *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 177 (1980); *Dandridge v. Williams*, 397 U.S. 471, 485, *reh. denied*, 398 U.S 914 (1970) (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Where a disability retiree of the Pension Fund also challenged the VSF on equal protection grounds, the Court held that it is "not arbitrary or capricious to limit the Variable Supplement Fund payments to service retirees" as the court has found "respondents' allocation of Variable Supplement Fund payment to be based on a rational and reasonable classification." *Ryan v. Board of Trustees*, 138 Misc.2d 826, 525 N.Y.S.2d 487 (Sup. Ct. N.Y. Co. 1988). Moreover, the legislature is afforded due deference for having "investigated and found facts necessary to support the legislation." *In Re Adoption of Malpica – Orsini*,

36 N.Y.2d 568, 571, 370 N.Y.S.2d 511, 331 N.E.2d 486 (1975) (citation omitted), *app. dismissed*, 423 U.S. 1042 (1976). Therefore, it may be presumed that the legislature was fully aware of the features of the statutory retirement scheme that operate in favor of some retirees and not others.

The Board of Trustees avers that the legislative decision to reserve VSFs only for service retirees was a legitimate attempt to equalize benefits among the various classifications of retired members. I find that this provides a plausible and rational basis for the classification of VSF payments. In a nutshell, the State shows a legitimate interest, in recognition of service retirees' longer periods of service and greater lifetime contributions to the Pension Fund, as well as effectuating the collective bargaining process, to justify the classification complained of by Castellano. The classification passes constitutional muster under the Equal Protection Clause.

Finally, Castellano claims that the denial of VSF payments constitutes a violation of the Contract Clause. U.S. Const. Art. I, sec. 10. Complaint ¶¶ 1, 12, 20. Additionally, Castellano claims state impairment of the contract under Article V, section 7 of the New York Constitution. Complaint ¶¶ 1, 13, 21, 22, 23. In order to prevail on claims of violations of the federal contract clause and state non-impairment clause, Castellano must show that some identifiable benefit set forth in these statutory sections is diminished or impaired by the enactment of the VSFs. *See Lippman v. Board of Education*, 66 N.Y.2d 313, 317-19, 496 N.Y.S.2d 987, 487 N.E.2d 897 (1985). Quite simply, none of the current benefits paid depend on the earnings of either the Pension Fund or VSFs; none of these benefits fluctuate with or depend upon investment earnings of the Pension Fund; and receipt of VSF payments apparently was not a subject of negotiation in the Pension Fund contract. Thus, the pleadings wholly fail to indicate a denial of benefits triggering the federal contract clause. The VSF payment scheme has neither diminished nor impaired any benefit set forth in the statutory Pension Fund contract. In sum, having failed to demonstrate that the receipt of VSF payments was an integral part of the original Pension Fund

contract, Castellano et al. wholly fail state a federal contracts clause or non-impairment clause violation.

For the foregoing reasons, the Board of Trustees motion to dismiss is granted and the complaint is dismissed in its entirety. Castellano's cross-motion for summary judgment is denied.

SO ORDERED

Dated: New York, New York
October 9, 1990

KEVIN THOMAS DUFFY, U.S.D.J.

MANDATE

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of June, one thousand nine hundred and ninety-one.

Present: HON. AMALYA L. KEARSE
HON. GEORGE C. PRATT
HON. JOSEPH M. MC LAUGHLIN
Circuit Judges,

PETER R. CASTELLANO, et al.,

Plaintiffs-Appellants,

-against-

BOARD OF TRUSTEES OF THE POLICE OFFICERS' VARIABLE SUPPLEMENTS FUND, BOARD OF TRUSTEES OF THE POLICE SUPERVISOR OFFICERS' SUPPLEMENTS FUND, HARRISON J. GOLDIN and THE CITY OF NEW YORK,

90-7950

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith, Clerk
By:
/s/Edward J. Guardaro
Edward J. Guardaro, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PETER R. CASTELLANO et al.,

Plaintiffs,

- against -

BOARD OF TRUSTEES OF THE POLICE OFFICER'S VARIABLE SUPPLEMENTS FUND, BOARD OF TRUSTEES OF THE POLICE SUPERIOR OFFICERS' SUPPLEMENTS FUND, HARRISON J. GOLDIN, and THE CITY OF NEW YORK,

Defendants.

89 Civ. 3272

JUDGMENT

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Defendants having moved pursuant to F.R.Civ.P. 12(b)(6) to dismiss plaintiffs complaint for failure to state a claim and lack of standing, plaintiffs having cross-moved pursuant to F.R.Civ.P. 56 for summary judgment to receive payments, and the said motions having come before the Honorable KEVIN THOMAS DUFFY, U.S.D.J., and the Court thereafter on October 12, 1990, having handed down its memorandum endorsement; denying plaintiffs' cross-motion for summary judgment, and granting defendants' motion to dismiss, and dismissing the complaint in its entirety, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiffs' cross-motion for summary judgment be and it is hereby denied, and it is further,

ORDERED, that defendants' motion to dismiss be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed in its entirety,

DATED: NEW YORK, NEW YORK
October 15, 1990

/s/
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON OCTOBER 22, 1990.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Peter R. Castellano, James Brinson, Richard T. Carberry, Robert A. Casaburi, Gary Baker, Jeffrey Baynon, Michael S. Ciavola, Frank N. Costagliola, James J. Clark, Grover Cleveland, Joseph P. Collins, Carmine DelGaldo, Antonio D'Esposito, Gerald M. Epstein, John C. Fiore, Thomas Fitzpatrick, Thomas Galanek, Salvatore Gallo, Marie Castorire Gatto Michael Gatto, John Gentile, Mary Glatzle, Richard G. Gsanger, Robert Hefner, Donald Hudec, Raymond Jaycoxe, Edward G. Justus, Theresa Kayser, Thomas King, William F. Kinsella, Frederick P. Kowsky, John Maher, Jerome McCambridge, Michael B. McCormick, George McGevna, Joseph C. Mertens, Gerard F. Miller, Francisco Muro, Lorraine J. O'Donnell, Matthew A. Orsi, Richard Putonti, Arthur Scarry, John Smyth, Daniel J. Spellacy, Robert A. Sprague, Roland Sprague, Russell Steinle, Andrew Tannariello, Robert Redgrave, Albert F. Taylor, Robert Tobuck, Frank J. Vento, Vincent F. Ward, Paul Zanki, Gergory E. Krieger, Richard J. Carroll, John C. Culkin, Daniel F. Hauschild, Charles W. Jones, John Kelly, Francis J. McCarvill, James McGinnis, Patrick Victor, Edward Conroy, Thomas Longobardi, Nicholas E. Lucarelli, Joseph M. Martucci, Salvatore Mazzola, Vincent J. Meli, John E. Melone, Cornelius J. Murphy, Ronald Piotrowski, Louis Russo, John Ehler, Henry Voss, John R. Watson, Brian Clark, Nathan S. Donato, Michael Douglas, Harvey Greenbaum, John J. Hasbrouck, Richard March, Norman M. Marino, Thomas Moore, Christopher Rush, Steve Sasala, Alfonse M. Tocco, Robert Mallien, George Adelson, Anthony Arcabascio,

COMPLAINT
JURY TRIAL
DEMANDED

Charles J. Balsamo, Vincent A. Battiato, Frank Bolz, Patsy Bonnano, Ralph E. Brech, Joseph Buceti, Vincent J. Calandra, James G. Carolan, Harold J. Donohue, Jr., John Friscia, John D. Kernaghan, Phillip Kissel, William Maher, James Maraday, Joseph S. Martinez, John E. Maxwell, Gerald J McGean, James J. McKee Sr., James McKee, Vincent Picciotto, Dominick J. Salerno, Joseph Scavo, Ronald Kwoczka, Alfred A. Delicata, Joseph Falardo, Elliott W. Lock, Arthur E. Micol, Jr., Harold Solidar, Allen Spergel, Frank J. Sweeney, Julius Zwail, Robert Cali, James Mottle, Angelo Lombardi, Anthony Pitruzzello, Michael McNulty, Edward J. Grove, Thomas F. Dunn, Edward J. Condolff, John Fitzgerald, George Sorrentino, John O'Grady, Lawrence, Hepburn, Alfred C. Cafferata, Frank Catalano, Louis M. Diaz, Stephen Gerke, Joseph Padovano, John J. Riggio, Richard A. Russo, Joseph Quilty, John Scarry, Edward DiTomasso,

Plaintiffs,

v.

Board of Trustees of the Police Officer's Variable Supplements Fund, Board of Trustees of the Police Superior Officers' Supplements Fund, Harrison J. Goldin, and the City of New York,

Defendants.

Jurisdiction

1. This is an action pursuant to 42 USC §1983 on behalf of the plaintiffs, who are retirees of the New York City Police Department. Jurisdiction is conferred by reason of the assertion that the defendants, acting under color of state authority, are depriving the plaintiffs of equal protection of the laws, and the deprivation property without due process of laws guaranteed by the Fourteenth Amendment to the United States Constitution; and depriving them of the protections of Art I, §10 of the United States Constitution guarantee against impairment of contractual obligations. Jurisdiction is also founded on New York Constitution Art. V §7 provisions of non-impairment of public employee pension benefits clause. This court has jurisdiction by virtue of 28 USC §§1343(a)(3) and 1343(a)(4).

Parties

2. The plaintiffs are retired members of the New York City Police Department, all of whom retired after 1968. Some of the plaintiffs retired under ordinary disability, others under service connected disability and others under a vested interest provision. Some retired in the rank of Police Officer, others retired in ranks of sergeant or in higher ranks, hereinafter referred to as superior officer ranks, and still others retired as detectives. All are members of the New York City Police Pension Fund, Article II.

3. The defendant, Board of Trustees of the Police officer's Variable Supplements Fund is an entity created by Chapter 876 of the Laws of 1970 of the State of New York for the purpose of administering the Police Officer's Variable Supplements Fund. The defendant, Board of Trustees of the Police Superior Officers' Variable Supplements Fund is an entity created by Chapter 876 of the Laws of 1970 of the State of New York for the purpose of administering the Police Superior Officers' Variable Supplements Fund.

The defendant Harrison J. Goldin is Comptroller of the City of New York, and a member of the Board of Trustees of the Police Officer's Variable Supplements Fund and the custodian of the monies and assets thereof, and is a member of the Board of Trustees of the Police Superior Officers' Variable Supplements fund and the custodian of the monies and assets thereof. The City of New York is a Municipal Corporation existing within the state of New York. All defendants are acting under color of state law.

Factual Allegations

4. During their tenure as police officers, superior officers and detectives, all plaintiffs were members of and contributed to the Police Pension Fund, Article II pursuant to Section B18-22.0 of the Administrative Code of the City of New York. The City of New York also contributes to the Pension Fund. The Pension Fund is governed by Sections B18-11.0 through B18-55.0 of the Administrative Code. Section B18-35.0 provides for return of contributions with accumulated statutory interest if a member resigns or is discharged prior to retirement. Sections B18-45.0, B18-46.0, B18-47.0 provide for retirement allowances for those officers who fulfill all the requirements for retirement. Each plaintiff fulfilled all the requirements of retirement.

5. Administrative Code §B18-27.0 requires all investment income of the Pension Fund, except for transferable earnings under §B18-27.1 to be used (a) first, to pay interest on the amounts in various funds of the Pension Fund; (b) second, to pay off losses on stock investments of the pension Fund; and (c) third, to reduce the City's normal contributions to the Pension Fund. The earnings do not enter into the statutory calculation of the members' retirement allowances.

6. The City of New York and the public employee organizations representing members of the uniformed police force entered into an agreement effective October 1, 1968. In order to effectuate the agreement, the New York State Legislature enacted Chapter 876, Laws of 1970, which established two Variable

Supplements Funds to provide payments to retirees of the Pension fund. The Patrolmen's Variable Supplements Fund and the Police Superior Officers' Variable Supplements Fund provided for supplemental payments to retired patrolmen and retired superior officers and detectives respectively.

7. Administrative Code B18-27.1 provides for the source of the funds for the Variable Supplements Funds. Under Sections B-18-22,B18-23.0, B18-24.0, B18-25.0 and B18-27.1, a certain portion of the investment earnings generated by the assets managed by the Pension Fund, including assets contributed by the members of the Police Department and by the City is transferred to fund the Variable Supplements Funds. When the Pension Fund's earnings from assets invested in equities exceed the hypothetical earnings which the same amount of assets would have generated if invested in fixed income securities, then the difference between these two amounts is transferred to the Variable Supplements Funds. The Trustees of the Variable Supplements Funds may, under the provisions of Administrative Code §§B18-63.0, B18-83. authorize payments from the funds to Pension Fund retirees "in such form, in such amount and in such cases" as the trustees may in their discretion determine, subject to the standards of "equity, fairness and prudent management."

8. Each of the Plaintiffs retired after 1968, each contributed to he Police Pension Fund during their tenure, each are and were members of the Police Pension Fund Article II, to which the legislation enacted relates. Those members who retired on disability before 20 years of service are subject to earning restrictions and possible physical re-examintion and recall to service at any time before the twentieth year.

9. Although payments from the two Variable Supplements Funds have, from time to time been made, and will, from time to time be made in the future, none of the plaintiff retirees who are members of the Police Pension Fund, Article II have received any such payments, nor have the Trustees of the two Variable Supplements Funds determined, as of the date hereof, that the plaintiffs will be given future payments.

10. Under the retirement procedures of the New York City Police Department, a member can retire by one of several ways. If a member, through no fault of his own, should become too sick or disabled by non-service related causes to continue in police service, he can be compelled to retire under ordinary disability and received a pension calculated upon past earnings and years as a member of the Department. If a member, through no fault of his own, should become disabled through service connected activity, such as being shot, otherwise wounded by aggressive action of perpetrators, or through accidents or other events which occur by reason of the performance of the member's duty, he can be required to retire on service connected disability. If a member serves 15 years his interest in a pension becomes vested, and he can retire at any time before the 20th year at which 20th year the pension payments begin. A member may serve 20 or more years, retire and receive pension payments on retirement. A member who serves more than 20 years and who thereafter becomes disabled, may, upon the event of the disability be required to retire on disability.

11. All plaintiffs are either ordinary disability, service connected disability or vested interest retirees who retired after 1968 and are all members of Police Pension Fund, Article II. Although other retired members of Police Pension Fund Article II who retired after 20 years service and who were not disability retirees, or vested interest retirees are receiving payments from the Variable Supplements Funds, the plaintiffs are not receiving such payments.

12. Under the provisions of the United States Constitution, Fifth and Fourteenth Amendment, a state may not deprive persons of equal protection of the laws, nor may it deprive persons of property without due process of law. Under United States Constitution Art. I, 10, cl.1 a state may pass no law impairing the obligation of contracts.

13. The provisions of New York Constitution Art. V, §7, provides that membership in any pension or retirement system of the State or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

As and for a First Cause of Action

14. The plaintiffs, who retired after 1968 and who contributed to and are members of Police Pension Fund Art. II have been and are being deprived of Equal Protection of the laws under the Fourteenth Amendment to the United States Constitution, by the defendants who are doing so under color of state authorty.

15. The the classification by which denial of the plaintiffs' eligibility to receive payments from the Variable Supplements Funds is being accomplished rests on grounds wholly irrelevant to the achievement of a valid state objective, and has no fair and substantial relation to the object for which the Variable Supplements Funds were enacted.

As and for a Second Cause of Action

16. The plaintiffs, who retired after 1968 and who contributed to and are members of Police Pension Fund Art. II have been deprived of property without just compensation and without due process of law under the Fourteenth Amendment to the United States Constitution, by the defendants who are acting under color of state authority.

17. The denial of the plaintiffs' eligibility to receive payments from the Variable Supplements Funds is being accomplished under circumstances which deprive the plaintiffs of property without just compensation and without due process of law.

As and for a Third Cause of Action

18. The collective bargaining agreement which precipitated the legislation which created the Variable Supplements Funds provided for the payment of variable supplement payments to members who retired after 1968.

19. The plaintiff members of Police Pension Fund Art. II, retired after 1968, and thereby had and have a contractual right as well as a property interest in the Police Pension Fund, Art. II, and the Variable Supplements Funds.

20. The defendants, acting under color of state authority, are impairing the obligations of contracts by depriving the plaintiffs of the Variable Supplements Funds payments.

As and for a Fourth Cause of Action

21. New York Constitution, Art. V §7 defines membership in any pension or retirement system of the State or of a civil division thereof as a contractual relationship, the benefits of which shall not be diminished or impaired.

22. Plaintiffs have and continue to have a property interest in the assets of the Police Pension Fund, Art II and the Variable Supplements Funds.

23. The actions of the defendants, acting under color of state authority, have diminished or impaired the property rights of the plaintiffs for wholly invalid reasons including benefitting from the disabilities having been inflicted on some of the plaintiffs, and from the authorized and lawful exercise of an existing option by the vested interest retiree plaintiffs.

Relief Sought

24. WHEREFORE: plaintiffs respectfully request a judgment of this Court:

a. Directing that plaintiffs be accorded payments from the Variable Supplements Funds in such amounts as other retired members of Police Pension Fund Art II have been paid, in such amounts as the plaintiffs would have been paid if they had been included in such past payments.

b. Directing that plaintiffs be paid such payments from the Variable Supplements Funds in the future which the defendants, from time to time, may pay to the retirees who are members of Police Pension Fund, Art. II.

c. Directing that the plainiffs be accorded all benefits of whatever nature that are generated by the Police Pension Fund Art. II and the Variable Supplements Funds, and to prohibit any exclusion of the plaintiffs therefrom.

d. Awarding the Plaintiffs costs of the action and reasonable attorney's fees, pursuant to 42 USC §1988.

d. Awarding such other and further relief as to the Court may seem just and proper.

Dated: May 12, 1989.

/s/Ronald Podolsky

Ronald Podolsky
Attorney for Plaintiffs
Fifteen Park Row, Suite 1122
New York, N.Y. 10038

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(212) 460-8218

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PETER R. CASTELLANO et al.,

Plaintiffs,

- against -

BOARD OF TRUSTEES OF THE POLICE OFFICER'S VARIABLE SUPPLEMENTS FUND, BOARD OF TRUSTEES OF THE POLICE SUPERIOR OFFICERS' SUPPLEMENTS FUND, HARRISON J. GOLDIN, and THE CITY OF NEW YORK,

Defendants.

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AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

89 Civ. 3272 (RJW)

SUSAN SANDERS, an attorney admitted to practice before the Courts of the State of New York and before this Court, says pursuant to CPLR § 2106 and under penalties of perjury:

1. I am an attorney in the office of PETER L. ZIMROTH, Corporation Counsel of the City of New York, the attorney for defendants in this action. I make this affidavit in support of defendants' motion to dismiss the complaint.

2. Plaintiffs' complaint is annexed hereto as Exhibit A.

3. Plaintiffs herein are former police officers, former police superior officers or former police detectives who retired either on accident disability, ordinary disability, or with a vested right to a deferred retirement allowance.

4. Plaintiffs are not eligible to receive certain supplementary payments, which do not constitute a pension or retirement allowance, from either the Police Officers' Variable Supplements Fund or the Police Superior Officers' Variable Supplements

Fund. Pursuant to §§ 13-268(5) and 13-278(5) of the Administrative Code of the City of New York ("Administrative Code"),[1] such payments may be made only to those who have retired for service.

5. Plaintiffs make four claims in this action. The first claim alleges that they have been denied equal protection of the laws, contrary to the fourteenth amendment to the United States Constitution, by defendants' actions under color of state law in denying them such payments. The second claim alleges that they have been deprived of property without just compensation and without due process of law, contrary to the fourteenth amendment to the United States Constitution, by defendants' actions under color of state law in denying them such payments. The third claim alleges that they have been deprived of "a contractual right as well as a property interest" by defendants' actions under color of state law, in violation of Article I, section 10 of the United States Constitution ("contract clause"), which prohibits states from passing any law impairing the obligation of contracts. The fourth claim alleges that their "property rights in the assets of the Police Pension Fund, Art II and the Variable Supplements Funds" have been diminished or impaired by defendants' actions under color of state law, in violation of Article V, section 7 of the New York State Constitution, which provides that the benefits of membership in a public retirement system may not be diminished or impaired.

6. Since plaintiffs' factual allegations are deemed to be true for the purpose of this motion to dismiss, the facts related herein summarize the salient allegations of plaintiffs' complaint and the legal facts surrounding these claims.

7. Plaintiffs herein are 181 former police officers who, prior to retiring, were members of the Police Pension Fund, Article 2 ("Pension Fund"). They are currently beneficiaries of such Fund, pursuant to § 13-214(5) of the Administrative Code.

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[1] All section references are to the Administrative Code as recodified in 1986.

8. The Pension Fund is governed by §§ 13-214 through 13-267 of the Administrative Code. The Administrative Code provides for member contributions, § 13-225; for the return of contributions with accumulated statutory interest if a member resigns or is discharged prior to retirement, § 13-240; and for retirement allowances for those police officers who fulfill all requirements for retirement, § 13-255 (service retirement); § 13-257 (ordinary disability); 13-258 (accident disability). Since 1969, pursuant to Chapter 827 of the Laws of 1969, those members of the Pension Fund who discontinue their memberships before completing the twenty-year requirement for service retirement, but after performing at least fifteen years of allowable police officer service, are eligible to receive a "vested right" retirement allowance with payability deferred to the earliest date they would have been eligible to retire for service. Admin. Code § 13-256.

9. The pension laws in effect when plaintiffs joined the Pension Fund form the basis of the contract each made with such Fund, pursuant to Article V, section 7 of the New York State Constitution, which states, in pertinent part:

> [M]embership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

10. The Second Circuit has held that Article V, Section 7 gives members of public retirement systems a property interest protected by the fourteenth amendment to the United States Constitution to their retirement allowances. *Winston v. City of New York*, 759 F.2d 242, 247 (2d Cir. 1985). Plaintiffs herein therefore acquired a protected property interest in the receipt of statutorily guaranteed retirement allowances at the time they joined the Pension Fund. Plaintiffs concede that they are receiving such retirement allowances, Complaint ¶ 2, and make no allegation that these allowances have been miscalculated.

11. The allowances payable by the Pension Fund are based on such statutory factors as salary and length of service and do

not fluctuate with the Pension Fund's investment earnings. Admin. Code §§ 13-255, 13-256, 13-257, 13-258. The retirement allowances are funded jointly by the members and the City. The members' contributions are used to fund an annuity, which makes up part of the total retirement allowance. Admin. Code §§ 13-255, 13-227(a). The remainder of the allowance is funded by the City. Admin. Code §§ 13-228, 13-229. The total amount of the allowance is guaranteed by the City pursuant to § 13-231 of the Administrative Code.

12. Section 13-232 of the Administrative Code requires all investment income of the Pension Fund, except for transferable earnings under § 13-232, to be used (a) first, to pay interest on the amounts in various funds of the Pension Fund; (b) second, to pay off losses on stock investments of the Pension Fund; and (c) third, to reduce the City's normal contributions to the Pension Fund. Investment earnings of the Pension Fund do not enter into the statutory calculation of members' retirement allowances.

13. The City and the public employer organizations representing members of the uniformed police force entered into a collective bargaining agreement effective October 1, 1968. In order to effectuate this agreement, the legislature enacted Chapter 827 of the Laws of 1969, which, *inter alia*, (1) increased the ordinary disability benefit for members of the Pension Fund with less than ten years of service from one-quarter to one-third of final salary, Admin. Code § 13-257, and (2) granted to members of the Pension Fund the right to acquire a vested right to a retirement allowance upon completion of fifteen years of service in accordance with prescribed terms. Admin. Code § 13-256. For the Court's convenience, pertinent parts of the bill jacket for this legislation, explaining its history and purpose, including the fact that it was intended to effectuate collective bargaining agreements entered into by the City and representatives of its public employees, are appended hereto as Exhibit B.

14. As the result of the same collective bargaining negotiations, legislation was also introduced to create two Variable Supplements Funds ("VSFs"), which would provide a supplemental

benefit to service retirees. Although the legislation was passed by the legislature in 1969, it was vetoed by Governor Rockefeller because there was no provision for the VSFs to come under the supervision of the New York State Insurance Department. Amended legislation, including this provision, was submitted to the 1970 session of the legislature and was passed as Chapter 876 of the Laws of 1970, thus effectuating this provision of the 1968 collective bargaining agreement. For the Court's convenience pertinent parts of the bill jacket for this legislation, explaining its history and purpose, the problems with the vetoed 1969 legislation, and the fact that it was intended to effectuate collective bargaining agreements entered into by the City and representatives of its public employees, are appended hereto as Exhibit C.

15. Pursuant to this legislation, two VSFs were established: the Police Officers' Variable Supplements Fund ("POVSF"), codified at §§ 13-268 through 13-277 of the Administrative Code, and the Police Superior Officers' Variable Supplements Fund ("PSOVSF"), codified at §§ 13-278 through 13-287 of the Administrative Code. These Funds are separate legal entities from the Pension Fund and are governed by their own Boards of Trustees. Admin. Code §§ 13-269, 13-270, 13-272, 13-279, 13-280, and 13-282. The statute establishing the VSFs expressly provides that the supplemental payments made by these Funds shall not constitute pension or retirement benefits under the Pension Fund. Admin. Code §§ 13-271(b) (2) (ii), 13-281(b) (2) (ii).

16. Section 13-232 provides for the source of funds for the VSFs. A certain portion of the investment earnings generated by the assets managed by the Pension Fund, including assets contributed both by police officers and by the City, is transferred to fund the VSFs. Admin. Code §§ 13-226, 13-227, 13-228, 13-229, 13-232. When the Pension Fund's earnings from assets invested in equities exceed the hypothetical earnings which the same amount of assets would have generated if invested in fixed income securities, then the difference between these two amounts is transferred to the VSFs. Admin. Code § 13-232. The Boards of Trustees of the two VSFs may authorize payments from the

Funds "in such form, in such amount and in such cases" as they may in their discretion determine, subject to standards of "equity, fairness and prudent management," to "pension fund beneficiaries." Admin. Code §§ 13-271, 13-281. *See also* Admin. Code §§ 13-269(b), 13-279(b) (payments may be made "to eligible pension fund beneficiaries"). Such payments may be discontinued at any time. Admin. Code § 13-271(b)(i), 13-281(b)(i).[2]

17. As used in §§ 13-271, 13-281, 13-269(b) and 13-279(b), "pension fund beneficiary" is defined in §§ 13-268(5) and 13-278(5) as a police officer or police superior officer who has "retired for service."[3] Moreover, §§ 13-277 and 13-287 of the

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[2] In 1988, pursuant to Chapter 247 of the Laws of 1988, the statutory sections pertaining to the benefits payable by, and the structure of, the POVSF were amended. These statutory sections now guarantee to each eligible retiree (*i.e.*, service retirees) a fixed annual supplement, thereby replacing the previous process which provided for a variable amount based on the relative performance of the stock and bond markets. The payment schedule now guarantees to each eligible service retiree an annual payment of $2,500 in 1988, which will increase by $500 annually thereafter to a maximum guaranteed payment of $12,000 annually in 2007. For those members of the Pension Fund who retire after June 30, 1988, the same payment schedule commences in the first year of retirement. *See* Admin. Code § 271, as amended by L.1988, Ch. 247. The PSOVSF continues to receive the same amount of transferable earnings as before, and is substantially unaffected by this legislation. For the Court's convenience, pertinent parts of the bill jacket for this legislation, explaining its history and purpose, and the fact that it was intended to effectuate the 1987 collective bargaining agreement entered into by the City and representatives of its public employees, are appended hereto as Exhibit D.

[3] Pursuant to L.1988, Ch. 247, the definition of "pension fund beneficiary" has been amended and now reads: "Any person who receives a retirement allowance by reason of having retired, on or after October first, nineteen hundred sixty-eight, *for service* (with credit for twenty or more years of service creditable toward the minimum period) as a member of pension fund, subchapter one or pension fund, subchapter two and as a police officer." Admin. Code § 13-268(5) (emphasis added). A new subdivision (1)(a) of § 13-268 defines "minimum period" as: "The minimum period of credited service which a member of pension fund .... is required by law to perform in order to be

(Footnote continued)

Administrative Code require that the plan to make variable supplement payments to eligible "pension fund beneficiaries" must be approved by the New York State Superintendent of Insurance specifically provides for payment to service retirees only.

18. Plaintiffs herein did not retire for service, pursuant to § 13-255 of the Administrative Code. They retired either for ordinary disability, pursuant to § 13-257 of the Administrative Code, accident disability, pursuant to § 13-258 of the Administrative Code, or with a vested right to a deferred retirement allowance, pursuant to § 13-256 of the Administrative Code. Complaint ¶¶ 2, 11. They are, therefore, not within the class of persons to whom the Boards of Trustees of the VSFs are authorized to make variable supplement payments.

19. Defendants move to dismiss the complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that it fails to state a claim upon which relief can be granted.

20. In order to state a claim for a violation of equal protection of the laws under 42 U.S.C. § 1983, it must be shown that a statute treats similarly situated people differently without a rational relationship to any legitimate state objective. In the first instance, petitioners herein are not similarly situated to those

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eligible to retire for service with immediate payability of retirement allowance." Thus, it is clear that the legislature has reaffirmed its belief that variable supplement payments should be made only to those who retired for service after completing at least twenty years of police officer service and that those who retired for disability, or with a "vested right" retirement allowance with deferred payability, should be excluded from receiving such payments. *See* letter I of Phil Caruso, annexed hereto as part of Exhibit D at p. 1 (explaining that original VSFs "sought to equalize the benefits provided for disability retirees by allowing additional benefits for service credit retirees").

Although this legislation is the subject of a separate litigation before this Court, such litigation is irrelevant to the determination of the instant case, as plaintiffs herein are excluded from receiving variable supplement payments under both legislative schemes.

former members of the Police Pension Fund who retired for service. The New York State Court of Appeals has determined that it is rational to provide entirely different retirement benefits to disability and service retirees. *Kuhnle v. New York State Div. of Human Rights*, 40 N.Y.2d 720 723 (1976), *aff'g* 50 A.D.2d 535 (1st Dep't 1975), *appeal dismissed for want of federal question*, 434 U.S. 898 (1977). Moreover, the legislation enacting the Variable Supplements Funds ("VSFs") has been upheld against equal protection claims and has been found to pass the rational basis test, which is applied to economic legislation, by both New York State and federal courts. *Crown v. Trustees of the Patrolmen's Variable Supplements Fund*, 819 F.2d 47 (2d. Cir. 1987), *aff'g* 659 F. Supp. 318 (S.D.N.Y. 1987); *Ryan v. Board of Trustees*, 138 Misc. 2d 826 (Sup. Ct. N.Y. County 1988), *aff'd without opinion*, ____ A.D.2d ____ (1st Dep't 1989).

21. In order to state a claim for a violation of due process under 42 U.S.C. § 1983, it must be shown that plaintiffs have been deprived of a protected property interest in which they have a "legitimate claim of entitlement" under state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) . It has been held, however, that while retirees of the Police Pension Fund have an entitlement to receive their pension payments – which they are receiving – they have no such entitlement to the investment earnings of the Police Pension Fund and, therefore, no protected property interest in any part of the monies generated in the VSFs. *Crown v. Trustees of the Patrolmen's Variable Supplements Funds*, 819 F.2d 47 (2d Cir 1987), *aff'g* 659 F. Supp. 318 (S.D.N.Y. 1987); *Poggi v. City of New York*, 109 A.D.2d 265 (1st Dep't 1985), *aff'd mem. on other grounds*, 67 N.Y.2d 794 (1986).

22. In order to state a claim under the federal contract clause, it must be shown that a subsequent legislative enactment has impaired existing contractual rights. Under New York State law, the provisions of the applicable statutes which were in effect at the time of joining a retirement system form the basis of the contract between a public employee and and his retirement system; the benefits of such membership, as described in the initial contract, may not be diminished or impaired. *Birnbaum*

v. Teachers Retirement System, 5 N.Y.2d 1, 9 (1958). It has been held that variable supplement payments are non-pension supplements given in addition to and independent of the retirement allowance provided in the pension contract and that "[m]embers have a contractual right only to the benefits described in the Administrative Code," which they admittedly are receiving. *Poggi v. City of New York*, 109 A.D.2d 665 (1st Dep't 1985), *aff'd on opinion below*, 67 N.Y.2d 794 (1986). Thus, under both the federal contract clause and New York State non-impairment of public employee pension benefits clause, Article V, section 7 of the New York State Constitution, the variable supplements legislation has neither diminished nor impaired any identifiable benefit set forth in the pension contract between plaintiffs and the Police Pension Fund.

/s/Susan Sanders
SUSAN SANDERS

Sworn to before me this
13th day of July, 1989

/s/Jay C. Cooke
Notary Public

Jay C. Cooke
Notary Public, State of New York
No. 31-4619864
Qualified in New York County
Commission Expires January 31, 1990

* * * *

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

April 27, 1970

A. 6508 - Rules

AN ACT To amend the administrative code of the city of New York, in relation to establishing variable supplements funds with respect to beneficiaries of the New York police department pension fund, article one of the New York police department pension fund, article two.

APPROVAL RECOMMENDED

Honorable Nelson A Rockefeller
Governor of the State of New York
Albany, New York

Dear Governor:

The above bill is before you for executive action.

This bill would amend the Administrative Code of the City of New York to establish two variable supplements funds which would be authorized to make supplementary payments to retirees of the New York City Police Pension Fund, Article 1, and Police Pension Fund, Article 2, and to persons receiving retirement system benefits as the result of the election of an option by such retirees.

One fund, to be known as the Patrolmen's Variable Supplements fund, which would be administered by a board of trustees consisting of a Mayor's representative, the City Comptroller and two representatives of the Patrolmen's Benevolent Association. The other fund, to be known as the Police Superior Officers' Variable Supplements Fund, would be administered by a board of trustees consisting of a Mayor's representative, the

City Comptroller and two representatives of the police superior officers and detectives of the uniformed force.

Under the terms of the bill, the monies to be paid out by the trustees, at their discretion, would consist of the amounts, if any, made available under a prescribed formula, as a result of investments of monies of Police Pension Fund, Article 2, in equities. Under the formula, the excess of the equity earnings in each fiscal year, over the interest earnings which the same amount of principal, invested in fixed income securities, would have produced during the same fiscal year, would be transferred to the variable supplements funds for distributions as supplements. Provisions are included in the formula to offset losses against gains on a cumulative basis, for the purpose of determining whether monies are available for distribution to the variable supplements funds with respect to any fiscal year.

Sharing of available monies by the two variable supplements Funds with respect to a fiscal year would be on the basis of the ratio of the total contributions ot the Police Pension Fund, Article 2, on behalf of patrolmen for such fiscal year to the total contributions to such Fund on behalf of police superior officers and detectives for such fiscal year.

The variable supplements Funds would not constitute pension or retirement systems and payments of supplements by such funds would not constitute a pension or retirement benefit and would not create membership in a pension or retirement system or create a contractual relationship with retirees or pension fund beneficiaries or members of the Police Pension Fund, Article 1 or Police Pension Fund, Article 2.

The two variable supplements funds would be subject to examination by the Superintendent of Insurance under Article 3 of the Insurance Law in the same manner as a life insurance company.

This bill is sponsored by the City of New York as a result of collective bargaining agreements made by the City with public

employee organizations representing the members of the uniformed police force.

This bill is one of 13 bills introduced at the request of the City of New York intended to effectuate collective bargaining agreements entered into by the City and representatives of certain of the public employees.

Accordingly, I urge your approval of this bill which is part of the City's legislative program.

Very truly yours,
JOHN V. LINDSAY, Mayor

By /s/
Legislative Representative

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PETER R. CASTELLANO et al.,

Plaintiffs,

- against -

BOARD OF TRUSTEES OF THE POLICE OFFICERS'S VARIABLE SUPPLEMENTS FUND, BOARD OF TRUSTEES OF THE POLICE SUPERIOR OFFICERS' SUPPLEMENTS FUND, HARRISON J. GOLDIN, and THE CITY OF NEW YORK,

Defendants.

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AFFIDAVIT IN OPPOSITION OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

89 Civ. 3272 (RJW)

RONALD PODOLSKY, an attorney admitted to practice before the Court certifies as true under penalty of perjury:

1. That he makes this affirmation in opposition to the motion of the Defendants and cross-moves for summary judgment.

2. It was the intention of the parties to present to the Court sufficient documentation for the resolution of the dispute herein without the necessity of a trial or expansive affidavit. Upon receipt of the Defendants papers, your affirmant complained to advisary counsel concerning the fact that, although Defendants were the custodians of all the appropriate documents all that had been provided in the moving papers were a series of cover letters absent the underlying documents to which they referred. In response thereto posing counsel sent a letter annexed hereto as Exhibit A indicating that the proposed text of the legislation, the underlying collective bargaining contract provisions, the text of bills as they left the Mayor's office and the Goldberg Panel Report would not be provided.

3. The contention by advisary counsel that the said documents are not relevant runs counter to the averments of Paragraphs 13, 14 and 15 of the moving papers.

4. The failures of the Defendants to provide such documentation in their moving papers has caused the Plaintiffs to seek out, procure, and to the degree possible, present them as part of these opposing papers.

5. The movants in Paragraph 13 indicate that the City and employee organizations entered into a collective bargaining agreement respecting disability pension and vested right retirement allowances. In Paragraph 14 the collective bargaining agreement is again referred to as it pertains to the variable supplements funds. Neither the collective bargaining agreement itself nor the legislation which was introduced are annexed to the papers. Upon information and belief, annexed hereto as Exhibit B is a portion of the collective bargaining agreement respecting the establishment of the "Supplemental Pension Fund", as set forth on the fourth page thereof. It should be noted that nowhere is there any provision that the payments not be accorded disability and vested retirees. Moreover, the Police Department and Fire Department each had similar contract provisions which were referred to the Special New York City Uniformed Forces Panel. Upon information and belief, annexed hereto as Exhibit C is a copy of that report. On Page 11 are the terms of the Police Supplemental Pension Fund, and on Page 23 are the terms of the Fire Department Supplemental Pension Fund. In neither of these panel recommendations is there any indication that Disability and Vested Retirees are to be excluded. Further, annexed hereto as Exhibit D is a report of the City Personnel Director proposed Personnel Orders Nos. 33/69 and 34/69, Paragraph 17 of which once again discusses the Variable Supplement Contract Provision which once again does not exclude Disability or Vested Retirees.

6. Because the City was bound by the Collective Bargaining Agreement to seek legislative enactment of the contract provisions, bills were introduced in the New York Legislature for the

Police Department and the Fire Department employees. Neither the letter of April 27, 1970, by Mayor Lindsay, nor the Memorandum of Ersah Poston, President of the Civil Service Commission, suggest that Disability or Vested Retirees were to be excluded. Moreover, upon information and belief Fire Department Vested and Disability Retirees do, in fact, receive the variable supplement payment.

7. Annexed hereto as Exhibit E are statements by James T. Kelly, who was President of the Detective Endowment Association from 1966 to 1972, and one from William V. Cosgrove, who was President of the Lieutenant's Benevolent Association* from 1957 to 1971, each of which letters attest to the fact that there was no written or oral exclusion of any retirees from the intended coverage of the Variable Supplement Funds. The New York Administrative Code, Section 13-268, defines Pension Fund Beneficiary in Subsection 5, as any person who received a retirement allowance by reason of having retired for service as a member of Pension Fund Subchapter 1 or Pension Fund Subchapter 2, or receives a benefit by reason of election of an option by such retired police officer. Said section, formerly Section B18-60.0 was added by laws 1970, Chapter 876. All of the Plaintiffs herein contributed to and are beneficiaries of the Police Pension Fund. Some of the Plaintiffs are vested retirees who left the job during the 15th to 20th year and are receiving or will receive on their 20th anniversary pension payments. Other Plaintiffs have retired prior to the 20th year of service either for ordinary disability or line of duty disability. Still others, having put in more than twenty years, chose to serve beyond the 20th anniversary and because of natural causes or service connected causes were compelled to retire for disability. Had those retirees retired at 20 years, they would be receiving variable supplement payment.

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* Because of possible ethical problems, affirmant requests court guidance on the propriety of requesting Hon. Eli Lazarus of this court for a statement as the then representative of the Superior Officers during the collective bargaining.

8. It should be noted that Chapter 877 of the Administrative Code of the City of New York, Section B, 19-40.00 (5), defines a "Pension Fund Beneficiary" as any person who receives a retirement allowance by reason of having retired from service as a member of Pension Fund 1 or Pension Fund 1-B***. As both the Fire and Police Department Contracts were simultaneously negotiated and simultaneously mediated by the Goldberg Pens 1, the word "for service" used in the Police Legislation and the term "from service" used in the Fire Department Legislation, did and should include all members of the respective retirement systems without regard to the manner of the members retirement. For the convenience of the Court a copy of the definition is annexed hereto as Exhibit F.

9. The challenged classification herein is a denial of equal protection of the law in that it rests on grounds wholly irrelevant to the achievement of a valid state objective. *Turner* v. *Fouche*, 396 US 346 (1970); *Matter of Hotel Association of the City of New York v. Weaver*, 3 NY2D 206.

10. The challenged classification is also a deprivation of property without compensation and without due process of law in that the City and the members of the service contribute to the Police Pension Fund. Such contribution by the City is made for and on account of service by its employees and for no other reason. To declare these Plaintiffs to be ineligible for the benefits of the Police Pension Fund is to deprive them of an emmolument of employment. In this regard, it should be noted that although all Plaintiffs were members of Police Pension Fund Article II, they do not enjoy all the benefits and privileges accorded other members.

11. The challenged classification also is an abridgement of the obligations of contract which is a violation of Article I, Section 10, of the United States Constitution. As the legislation was supposed to be the implementation of a collective bargaining agreement provision, and as the members of the Employee Unions were, by the terms of the agreement not classified into factions in so far as the variable supplement provisions were concerned,

the displacement of these Plaintiffs from their status as full members of the pension system is an impairment of the obligation of the contract.

12. The benefits of membership in a public retirement system may not be diminished or impaired, under the terms of Article 5, Section 7 of the New York State Constitution.

13. Unfortunately, the Plaintiffs have been unable through their own efforts to obtain a copy of the Legislation relating to the Police Variable Supplement Fund as it left the Mayor's Office on its way to Albany. By reason of this inability, your affirmant has been unable to conclusively document the claim of the Plaintiffs that the Fire Department and Police Department Legislation both read "from service", and that an unauthorized and handwritten change on that document relating to the Police Variable Supplement Fund made it read "for service". It is requested that this Court direct the Defendants to produce a copy of both bills as they appeared when they originally left the Mayor's Office.

14. The assertion that the Legislation indicates that the Variable Supplement Payment is not to be considered a pension payment cannot constitutionally stand. It should be noted that the City contributes to the Fund which generates the income which eventually finds its way into the Variable Supplement Fund. Unless such payment is considered a Pension Benefit, such payment would be illegal as an unconstitutional gift of public funds. Either its a pension payment or its an illegal gift of public funds.

15. It is well established that, although a statute is entitled to a strong presumption of constitutionality such constitutionality must be determined by application of the rational basis test. Under this test a statuatory classification is constitutionally permissable only if it is rationally related to a legitimate state objective. When it is not so related the statute violates the equal protection clause. It is suggested that the conferring of a gift of public funds by definition is not a legitimate state objective.

In fact, such a gift is unconstitutional under the provisions of New York Constitution, Article VIII, Section I, (1). It is only when payments are made for increasing the pension benefits payable to retired members of a police department that any such payment would be accepted pursuant to Paragraph 2. Thus, in order to be a legitimate state objective in conformity with state constitutional prohibitions, any payment of the Variable Supplement Fund must be viewed as increasing police pension benefits.

16. Moreover, with respect to vested retirees, the provisions of Employee Retirement Security Act of 1974 (ERISA), requires retirement plan administrators to give in writing the most important facts about the plan to all participants in a matter understood by the average participant respecting how it operates, and the rights and entitlement of each participant. Affirmant has been informed that at least one Plaintiff had over 19 years' service when he elected, before his twentieth year, the vested retirement option. The exercise of the option by this officer, will effectively deprive him of variable supplement payments which event is merely one indication of the lack of legitimate state objective, which makes the Defendants action unconstitutional. This is especially so since it is the duty of the Trustees to "to give consideration to equity, fairness and principles of prudent management" (Administrative Code, Section 13-281 (a)). The exclusion of the Plaintiffs who were members of Article II of the Retirement System violates the obligation of contracts under the provisions of the United States Constitution, Article I, Section 10. The Collective Bargaining Agreement pursuant to which the funds were created provided for no such exclusion.

WHEREFORE, it is respectfully requested that the motion of the Defendants to dismiss the complaint be denied and that summary judgment be granted to the Plaintiffs for the relief requested in the complaint, with such other relief as to the Court may seem just and proper.

Dated: September 14, 1989

/s/Ronald Podolsky

RONALD PODOLSKY

* * *

Vested Pension

The City shall prepare, submit, and support legislation to amend the present law so as to provide a vested pension interest for all patrolmen after 15 years of service in the Police Department, to become payable on the anniversary date of what would have been the patrolman's 20th year of service. Any patrolman desiring to avail himself of the retirement option under the terms of this section shall give 30 days notice of such intent.

Ordinary Disability Pension

The City shall prepare, submit, and support legislation effective July 1, 1969, to amend the present law so as to provide an ordinary disability retirement allowance equal to one-third final pay for patrolmen with less than 10 eyars of service; and an ordinary disability retirement allowance equal to one-half of final pay for patrolmen with more than 10 but not more than 20 years of service.

If a member has more than 20 years of service and retires for ordinary disability he shall receive a retirement allowance equal to one-fortieth times the annual salary on the date of retirement multiplied by the number of years of creditable police service.

SUPPLEMENTAL PENSION FUND

The City and the Association agree to cause to be paid over to a separate fund, established within the present Police Pension Fund, the proceeds of the annual yield and capital appreciation, realized or unrealized, earned by reason of an investment in equities in excess of the yield which would have resulted from investments such as bonds, mortgages and other fixed income securities. The purpose of this fund shall be to provide a supplemental benefit on a variable annuity basis, for Articles I and II, as determined by the trustees. The fund shall be jointly administered by two trustees, who shall be the Mayor or his representative on the Police Pension Board and the Association designee on such Board. Deadlocks between the two trustees shall be resolved by arbitration by (arbitrator to be selected); or if he fails or is unable to serve, by the arbitration provisions of this Collective Bargaining agreement.

It is also agreed that the City and the Association shall jointly sponsor and support appropriate legislation to expand within a reasonable scope the present permissible limits on investments.

The calculation to determine the amount to be paid over to the separate fund shall be made annually, not later than 30 days after the close of the fiscal year for which payment is due, and payment shall be made within 30 days thereafter.

* * *

65-25 160th Street, Apt. 16C
Flushing, New York 11365
August 3, 1989
Tel. 1-718-591-6885

TO WHOM IT MAY CONCERN:

I write this letter in an effort to help correct an injustice which was done to certain retirees of the New York City Police Department, through no fault of their own, upon their retiring from the Police Department.

I refer to the disenfranchising of disability retirees and vested retirees, from monetary benefits which they are entitled to and which it was never my nor any of the other Superior Officers Council Presidents to deny them from receiving.

I was the President of the Detectives Endowment Association from January 1, 1966 to July 31, 1972, and as such represented the 3,700 Detectives at all meetings of the Variable Supplement Fund. At no time during discussions was there any mention of excluding any segment or class of members of the service from receiving or benefiting from this fund.

I am available to appear at anytime – anyplace to help right this injustice to a small but qualified group. It was my intention when I signed this piece of enabling legislation to see that everyone retiring from the service, would receive benefits of an equal share for their service.

Respectfully submitted,

/s/James T. Kelly
James T. Kelly
Retired Detective
Former President Det's.

State of New York
County of Queens
Appeared before me this 4th day of August, 1989
/s/Kimberly A. Klosner
KIMBERLY A. KLOSNER, NOTARY PUBLIC

108 Lewis Road
East Quogue, N.Y., 11942

TO WHOM IT MAY CONCERN:

The undersigned was president of the Lieutenants Benevolent Association, New York City Police Department from 1957 to 1971 and during this period represented approximately 1150 Police Lieutenants.

I received from the City of New York written certification as sole bargaining agent for all Police Lieutenants to represent same in all facets of Collective Bargaining. In such capacity, I represented them at all meeting of the Variable Supplement Fund. At no time did I ever agree to exclude retirees from the benefits of this Fund because they retired with a disability, retired with vested interest or retired prior to a certain period of time.

Evidently the City acted unilaterally, in complete violation of our Collective Bargaining Agreement. This situation calls for redress, I am willing to appear before any agency or court to prove the truth of this statement. The City's action that excluded certain groups from equalization under the Variable Supplement Fund is an injustice and a violation of the Taylor Law because there was no representation for 1150 people that I represented. This was and is illegal.

William V. Cosgrove
/s/William V. Cosgrove
President Emeritus
LBA-N.Y.C.P.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PETER R. CASTELLANO, et al.,

Plaintiffs,

-against- 89 Civ. 3272 (RJW)

BOARD OF TRUSTEES OF THE POLICE OFFICER'S VARIABLE SUPPLEMENTS FUND, et al.,

Defendants.

Plaintiffs' Reply Affirmation.

Ronald Podolsky, Attorney duly admitted to practice certifies the within as true under penalty of perjury:

That he makes this reply in opposition to the motion to dismiss the complaint and in support of the motion for summary judgment of plaintiffs.

That the response is to the affirmation of Susan Sanders, Attorney on behalf of the defendant, heretofore submitted.

In response to the assertions of point I of the defendants' reply papers, [hereinafter the reply], it is noted that the contention that as a threshold matter, plaintiffs must demonstrate that the provision of the Collective Bargaining Agreement they rely upon specifically provides that disability and vested right retirees are to be recipients of the variable supplement benefits. It should be noted that defendant, the City of New York, being a party to and having access to the original collective bargaining agreement, and original home rule message as it left the Mayor's office, have steadfastly and adamantly refused and neglected to

make true copies of the originals as part of their papers. Instead, secondary evidence, such as the Goldberg report and various letters and reports are supplied. Even from these papers, however, it can be shown that there was and is no distinction drawn between any group of retirees insofar as entitlement to the Variable Supplements Fund distribution is concerned.

The reason Plaintiffs do not have a copy of the original fully executed collective bargaining agreement is that it was stipulated that these motions would be made to short circuit the need for formal discovery. That agreement, however, is and was conditioned upon the full disclosure in the papers to be submitted of the underlying documents to which any averments in the papers refer.

The "Proposed Collective Bargaining Agreement between the Patrolmen's Benevolent Association and the City of New York, Latest Revision – January 29, 1969," annexed to plaintiffs' oppoosing papers to the motion to dismiss, Ex. B provides on page 4:

> **Supplemental Pension Fund.** The City and the Association agree to cause to be paid over to a separate fund established within the present Police Pension Fund, the proceeds of the annual yield and capital application, realized or unrealized, earned and by reason of an investment in equities in excess of the yield which would have resulted from investments such as bonds, mortgages and other fixed income securities. The purpose of this fund shall be to provide a supplemental benefit on a variable annuity basis, for Articles I and II, as determined by the trustees. The fund shall be jointly administered by two trustees who shall be the Mayor or his representative on the Police Pension Board and the Association designee on such Board. Deadlocks between the two trustees shall be resolved by arbitration by (arbitrator to be selected); or if he fails or is unable to serve, by the arbitration provisions of this Collective Bargaining agreement.

> It is also agreed that the City and the Association shall jointly sponsor and support appropriate legislation to expand within a reasonable scope the present permissible limits on investments.
>
> The calculation to determine the amount to be paid over to the separate fund shall be made annually, not later than 30 days after the close of the fiscal year for which payment is due, and payment shall be made within 30 days thereafer.

If in the absence of the defendants' producing, for the purposes of this motion, the original signed copy, one can conclude that this provision is what was agreed to. Thus plaintiffs' initial assertion in their moving papers that there was never a contemplation by the parties that, vested or disability retirees be excluded from the variable supplements benefits. On the contrary, the fund was "a separate fund established within the present Police Pension Fund." Its purpose was to provide a supplemental benefit on a variable annuity basis for Article I and II, as determined by the trustees.

The Trustees were not thus empowered to determine who was eligible, but rather the variable amount to be paid in each of the years in which payment was to be made, based on the excess earnings of the pension fund experienced in each year.

Moreover, since the defendants are alleging that the exclusion is by reason of the legislation, any allegation would he misplaced. All parties agree that the legislation was passed to effect the terms of the agreement. Thus the legislation could not by its terms exclude the variable fund from the pension fund because the agreement provided for a separate fund established within the present Police pension Fund, and provided for no exclusion of any retired member. The Legislature is bound by the home rule message, (See *N.Y. Constitution* Art IX, 2(b)) which message has not been shown by the defendants to contain any exclusion of any Pension member regardless of how the member retired. Thus the identification of the obligation

of the contract which has been impaired under the *United States Constitution* Art. I Sec. 10 was the obligation of the city to seek appropriate legislation to effect the terms of the contract. Plaintiffs' are in total agreement with the statement of opposing attorney Sanders who recognizes at the top of p. 9 of her reply that "the Collective Bargaining Agreement at issue herein specified that in order to effectuate the agreement, 'the City and the Association shall jointly sponsor and support appropriate legislation," and the assertion on p. 12 that, "The VSFs were enacted to effectuate the Collective Bargaining Agreement of 1968." This identification of obligation, it is submitted, satisfies the concerns of the defendants in their citing of the *Energy Reserves*, and *Keefe* cases. The impairment, should this court find that all members were to be included in the distribution of the variable supplements fund payments, is substantial. And, as specified in the impairment of contracts clause of the Constitution, the obligation is between a political subdivision of the state and private individuals.

It should be remembered that all plaintiffs were or are members of the pension plan within which the Variable Supplements Funds were to be set up. Thus the obligation alleged to have been impaired is clearly and unequivocally expressed. In the absence of any express exclusion, the members are all included.

Under the clear terms of *New York Constitution* Art. VIII, §1, the Legislature could not have constitutionally designate the payments as a non-pension benefit, because of the Constitutional requirement is that public funds may not be paid unless it is a payment of a pension benefit of a police pension system.

The collective bargaining agreement does not designate the Variable Supplements Fund as a non-pension benefit. It does not mention any 20-year requirement of service for eligibility. It does not by its clear terms exclude any member. It is a payment made only to members of the Police Department who are eligible under various senarios to retire.

Moreover, as indicated in your affirmant's prior opposing papers to the motion to dismiss, Justice Grossman in the *Odenthal* case considered such payment to be a pension payment. Further, counsel to the New York State Division of Human Rights, in assessing a claim of Thomas G. Bergamine, a police officer, retired for disability who claimed discrimination by reason of disability in employment by reason of being denied the variable supplement payment, concluded that:

> It is clear also that the Variable Supplement Fund functions as part of a "retirement policy or system," despite the specific statutory language that the funds "shall not be, and shall not be construed to constitute, a pension or retirement system or fund." *See: N.Y. Admin. Code*, Sec. 13-269 (5). The Legislature sought by this system to provide a non-pension supplement to Pension Fund retirees, rewarding service retirees who generally contribute more. *See: Ryan v the Board of Trustees*, 138 Misc.2d 826, 525 N.Y.S.2d 487 (Sup. Ct. 1985). The Funds were created from interest derived from Pension Fund income and payment is triggered by participation in the Article II Pension Fund. p4).

A copy of the determination is annexed hereto as Ex. A. This conclusion that the payment of the variable supplement is a pension benefit irrespective of the legislation being considered is fully consistent with *New York Constitution*, Art. VIII, Sec. 1 which prohibits a City from lending or giving any money or property as a gift in aid of any individual except if payments are made for increasing the pension benefits payable to retired members of a police department, although, for the purposes of the jurisdiction under the Human Rights Law, the report concluded that the exclusion of disability retirees was not a subterfuge to avoid its purposes, and hence for the limited jurisdictional purposes of the Division. As the allegee activity was a continuing one, the complaint was not untimely.

The assertion on page 4 of the defendants' reply indicates that plaintiffs argue by negative inference. Defendants in claiming that the terms of the legislation reflected the terms of the

collective bargaining agreement which allegedly contained such an exclusion for vested and disabled retirees is an argument by negative inference in the absence of a full and true copy of the collective bargaining agreement itself. This court should direct the defendants to produce a copy of the full original collective bargaining agreement, as well as the full panoply of home rule messages (See[*New York Constitution*, Art. 9, 2b), letters and memoranda which were submitted in support of the legislation.

Plaintiffs joined in urging the concept that this case could be decided on papers, and frankly were expecting the full disclosure by the defendants of the relevant documents without the necessity of discovery. Defendants have such documents, and nowhere in any of them which predate the legislation in question has it been demonstrated that any member of the pension plan was to be excluded by reason of physical disability or vested retirement.

Nor is the *DiGiacomo* case cited on page 5 of the defendants' reply of any particular comfort to their position. There the letters contemplated a later agreement. They constituted in effect an agreement to form an agreement. Here there were, in fact, final collective agreements subscribed to by the city and each of the bargaining unions under the collective bargaining and Taylor law, the terms of which did not exclude any member of the pension system. Also in *DiGiacomo* the 20 year defined beneficiary component was specifically designated. The question there was simply whether the 20-year component included disability retirees with over 20 years service. Here there is no mention whatsoever in the contract terms providing for variable supplements payments any 20-year component provided for in *DiGiacomo*. Moreover, although privy to and custodian of documents relating to the negotiations, the city has not produced one shread of documentary evidence upon which an exclusion of any retired member from the benefits of the variable supplements payments can be based.

The assertion on p. 5 of the reply that the PBA was the only bargaining agent and that the statements by Kelly and Cosgrove

are were introduced to obfuscate what actually took place at the negotiations is not so. The PBA was the lead bargaining unit, but the superior officers and detective organizations provided explanations and input to their members and were consulted respecting the contract provisions, and the member.s of the various collective bargaining unions were asked for approval. This entire line of attack on the part of the defendants can be cleared up immediately by setting forth the collective bargaining agreements of the PBA, Sergeants' Benevolent Assn., Lieutenants' Benevolent Assn., the Captains' Endowment Assn. and the Detective Endowment Assn. showing the signatories thereto and any approvals from these superior officer organizations. Moreover it should be noted that Lt. Cosgrove is retired and is receiving the variable supplement payment. He is neither vested nor a disability retiree, and has no particular reason to mistate the facts. Although Det. Kelly is disabled, his wife is a retired member who is receiving the variable supplement, and likewise has no reason to mistate what transpired. The PBA is not the certified bargaining unit for the other organizations under the New York City Collective Bargaining laws and the Taylor Law.

Supporting the contention of the plaintiffs that the contracts initially did not distinguish between types of retirees is the fact that the original negotiations took place in apparent tandem with the Fire Department negotiations. Their original law read "retired from service". Defendants make much of the assertion that this was a typographical error and that the Fire Department legislation was thereafter amended to read "retired for service", as per letter of Richard A. Brown, Reply Ex. E. However, again, there is no underlying documentation respecting whether it should have been the other way around. That is, in order to reflect the original contract should the Fire Department legislation have been changed to conform to the Police Department legislation, or was the Fire Department legislation originally a correct reflection of the terms of the collective bargaining agreement thereby requiring the police department legislation to be changed to "from service" to conform with the Fire Department. Without the original documents, which the defendants

refuse to produce, their motion cannot be granted. It is plaintiffs' contention that the manner in which an officer retired had no bearing whatsoever to the entitlement to the variable supplement payments, and no such distinction exists in regard thereto either in the collective bargaining agreement itself, the Goldberg Report, the home rule message or the documentation generated therefrom, before the initial legislation was passed.

Moreover, the term "retired for service" in the legislation is not defined by its terms to exclude vested and disabled retirees. After receiving the defendants' papers, Affirmant has again been informed that vested retirees of the fire department do receive the variable supplement payment after the 20th anniversary of their entry into service, and has been informed upon further inquiry that disabled firemen do not. Annexed hereto as Ex. B is the cover and p. 16, of the Uniform Firefighters Association Pension Handbook. Page 16 indicates that a vested member on his 20th anniversary of appointment will receive a Service Retirement Allowance. Pursuant to that provision, upon information and belief, vested firefighters are receiving the variable supplement payment. Further, Annexed as Ex. C is a newsletter of Fire Department retirees respecting the vested fire retirees' entitlement to the Variable Annuity Pension, which, upon information and belief is the Variable Supplements Fund of $150 per month. The matter can be cleared up if Defendants would provide an authoritive letter from the Fire Department Bureau of Personnel Retirement Desk, or the Bureau of Fiscal Services, Pension Section.

Members who retire after 20 years who are not retired for disability receive the variable supplement payment. Disability retirees with over 20 years service could have retired at the 20th year, but, because they stayed on, were surveyed out on disability. They thus are bound by the common 20 year thread which runs throughout the retirement plan of the Police Department. Similarly, vested retirees may retire between the 15th and 20th year, but do not receive the pension until the 20th year. At the 20th year, the vested member's retirement is republished in Police Department Orders on pensions. Significantly, members who

retire on disability prior to the 20th year of service, remain under Police Department control and supervision. They must present to the Police Department a Financial Disclosure Questionnaire, PD form 440-150 a copy of which is annexed hereto as Ex. D pursuant to *Administrative Code of the City of New York*, 13-254. That Section provides that the Police Department may require any person who has retired for disability and has less than 20 years service to undergo a yearly physical examination for the purpose of determining whether he is able to engage in gainful employment, and that the retirement allowance of a disability retiree must be reduced if such retiree does engage in a gainful occupation, or is offered city-service following the medical examination. Thus the 20 year thread controls those who retire for disability before the 20th year of service. It is only members of Article II who resign or are discharged for cause who do are not entitled to receive a pension, because they, unlike all other catagories, have not retired. Thus it is clear that the variable supplements fund is a retirement benefit, the entitlement to which is contingent upon being entitled to a police pension.

The notion that the variable supplement payment was intended to be given only to those who retire after 20 years as some sort of equalizing factor is unfounded. It is argued that those members generally contribute longer to the fund. This is not so. Many if not most of the disability retirees have over 20 years service and contribute the same if not more than those receiving the variable supplement payment. Moreover, those who retire before the 20th year for service connected or ordinary disability retire generally at lower ranks where salary based pension figures are low because the career and career path promotional expectations were cut short by reason of the disability. Moreover the future earning capacity of the disabled retiree presumptively has been curtailed or foreclosed by reason of the disability. Annexed hereto as Ex. E is an analysis of the current stance of the various types of retirees taking into account the tax, variable supplement payment and retirement allowances which disprove the notion that the exclusion of the disability and vested retirees is an equalizing benefit to those who retire after 20 years without disability.

The assertions on page 14 of the defendants' Reply respecting the due process claim, indicates that the legislature made it clear that the payment of the VSF benefits is not a pension benefit. That does not adequately address the contention by plaintiffs that any such effort is violative of Art. VIII of the *New York Constitution*, and that any such payment must by constitutional definition be a pension payment under a police pension plan.

The contention that the Equal Protection claim is not valid, the defendants do not address the fact that the contract upon which the legislation was based did not discriminate against vested and disability retirees on the one hand and other retirees on the other. Nor was any such exclusion provided for in the section of the contract calling for the establishment of such separate fund "within the present Police Pension Fund".

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In further support of the contention that the vested Fire Department retirees get the variable supplements payment the court is referred to *N.Y. Administrative Code* 13-360, 361 dealing with the Fire Department which is in conformity with the fire union handbook reference annexed to these papers. The term "Vested" contemplated at least 15 years of service to become entitled to a retirement pension. On the 20th anniversary, the fire vested member then becomes a service retiree. It is thus apparent that the original term "from service" in the fire department legislation is not necessarily the result of a typographical error, and that it was the police legislation and not the fire legislation which should have been amended. There is a complete absence of any documentation offered by the defendants which sets forth any intended exclusion of any member of the Police Pension Fund from the benefits of the variable supplements payments.

It should be noted that the PBA, and other police unions, as well as trustees of the Police Pension Fund and the Board of Trustees of the Variable Supplements funds had, have and will remain having in the future a fiduciary relationship with all members of the Police Pension Fund Art II of which plaintiffs were and are members. As nowhere in the collective bargaining agreement does there appear to be an exclusion of vested or disabled retirees from the benefits of the variable supplement provision, it appears that the initial and continuing exclusion of plaintiffs from the benefits of the funds would be either as a result of a conflict of interest, or as a result of a fiduciary duty on the part of those entities.

Any entitlement to the variable supplements funds is based upon membership in the Police Pension system. *New York Constitution*, Art. V, Sec. 7, makes it clear that membership in a police pension system is a contractual relationship, the benefits of which shall not be diminished or impaired. This provision is consistent with and comprable to the prohibition of states from abridging or impairing the obligations of contracts. *United States Constitution*, Art. I., Sec. 10, cl. 1. When read in conjunction with *New York Constitution*, Art VIII, Sec. 1, (1)(2), which prohibits the giving of any money or property as a gift in aid of

any individual exdcept if the payments are made for "increasing the pension benefits payable to retired members of a police department" it is clear that the payment is a pension benefit made to members of a police pension system for and on account of police retirement. As the State Division on Human Rights counsel observed the variable supplements payment a pension benefit. Further the witholding of such payment is a continuing wrong, each such witholding is a separate act. The variable supplements payment is a benefit of being a member of the Police Department, and is not paid until a member retiress and is not paid to either active members of the department who have not retired. It is a retirement benefit. All members who retired, irrespective of how the retirement took place are entitled to share therein. The denial by defendants of the payment to the plaintiffs is a denial of Equal Protection of the Laws under the 14th Amendment to the *United States Constitution* making the relief sought in this 42 USC 1983 action appropriate.

By reason of the foregoing considerations, it is respecfully requested that the motion to dismiss the complaint be denied and that the cross-motion for summary judgment on behalf of the plaintiffs be granted with such other relief as to the court may seem just and proper.

November 2, 1989.

/s/Ronald Podolsky

Ronald Podolsky
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